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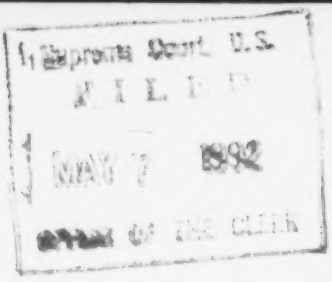

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER, 1991 TERM

EDDIE LOUIS TAYLOR,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

I. Are law enforcement personnel in Memphis, Shelby County, Tennessee, discriminately enforcing state and federal narcotics laws so as to violate the protections of due process and equal protection under the law pursuant to the Fifth and Fourteenth Amendments wherein seventy-five (75%) percent of the persons of the Memphis International Airport targeted for an investigatory stop by law enforcement officers are black and only five (5%) percent of all air travelers in Memphis' geographic region are black?

A. The Sixth Circuit Court of Appeals sitting En Banc erred in holding that the constitutional provisions of due process and equal protection could be vitiated by a person by consenting to a

"consensual interview" and subsequent search of the person where:

1. There was unrefuted testimony in the record that blacks were being disproportionately targeted for investigatory stops and the en banc majority failed to use strict scrutiny to review the unlawful conduct of the officers.

2. The en banc majority failed to follow their own precedent that states that unlawful conduct by law enforcement that precedes consent vitiates that consent. United States v. Kelly, 413 F.2d 261 (6th Cir. 1990.)

II. The Sixth Circuit Court of Appeals sitting en banc erred in upholding

the district court's classification of the Petitioner's search and seizure as a "consensual interview" that did not implicate Fourth Amendment rights wherein the Petitioner was followed through the Memphis International Airport and out the airport exit doors to the curb where he was forcibly moved by two law enforcement personnel off the curb and back up against a wall, where he was flanked and confined by three officers, was interrogated with incriminatory questions, and was in fact not free to leave from the outset of the stop.

III. The Sixth Circuit Court of Appeals sitting En Banc erred in upholding the District Court's vague determination that the Petitioner had consented to the search of his tote bag and the contents

therein wherein the Petitioner was unlawfully seized for Fourth Amendment purposes preceding the discovery of any contraband, no valid consent to search was even given by the Petitioner, and where no search warrant was ever procured allowing law enforcement officers to cut into the tightly wrapped packages found in the Petitioner's tote bag.

B. PARTIES TO THE PROCEEDINGS

W. Hickman Ewing, United States Attorney, and Sidney Alexander, Assistant United States Attorney, represented the United States of America before the District Court for the Western District of Tennessee, Western Division. Mr. Ewing and Mr. Alexander also represented the Government before the original three Judge panel and the En Banc hearing before the Court of Appeals for the Sixth Circuit.

At the District Court level and at all stages of appeal, Robert M. Friedman represented Defendant, Eddie Louis Taylor, as privately retained counsel. Lawrence W. White, Attorney, also represented Petitioner on appeal.

The National Association of Criminal Defense Lawyers was permitted to file and enter Amicus Curie Brief before the Court

of Appeals for the Sixth Circuit by and through Nancy Hollander, Attorney at Law and Vice President of the National Association of Criminal Defense Lawyers.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

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D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

United States v. Taylor, 917 F.2d 1402 (6th Cir. 1990). Full text of opinion located in Appendix.

E. JURISDICTIONAL STATEMENT

1. The judgment sought to be reviewed was decided and filed February 10, 1992, by the Sixth Circuit Court of Appeals sitting en banc.

2. The Petitioner anticipates no cross-petition for certiorari.

3. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

F. CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT 4

Unreasonable searches and seizures.-The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.-No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put to jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken for public use, without just compensation.

AMENDMENT 14 SECTION 1

Citizenship - Due process of law - Equal protection.-All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21 USCS 841

§841. Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

G. STATEMENT OF THE CASE

On October 3, 1988, the Petitioner was arrested and subsequently charged with violation of Title 18, United States Code, Section 841, et. seq., Unlawful Possession of a Controlled Substance With Intent to Sell or Deliver.

A Pre-Trial Motion to Suppress Evidence was properly and timely filed by the Petitioner and, after lengthy evidentiary hearings were conducted in the District Court, said Motion was denied by Written Order Denying Motion to Suppress Evidence. (See Appendix.)

The Petitioner subsequently entered a Conditional Plea of Guilty, specifically reserving the right to appellate review concerning all search and seizure issues.

The Petitioner's written Memorandum Outlining Plea Agreement Pursuant to Rule

11(e)(2) of the Federal Rules of Criminal Procedure included a request for the Petitioner to remain free on bond, pursuant to the Federal Rules of Appellate Procedure 9(c) and Title 18 U.S.C. Section 3143. Said request was granted by the District Court, and the Court affirmatively set forth in its Order of Release of Defendant, Eddie Louis Taylor, Pending Sentence and Appeal Pursuant to Conditional Plea and Reservation of Appellate Rights by the Defendant that the Petitioner was not a danger or risk of flight, that the appeal was not for the purpose of delay, and that the appeal raised a substantial question of law or fact likely to result in reversal.

The Petitioner properly and timely filed a Notice of Appeal, briefs were properly submitted and orally argued

before the Honorable United States Court of Appeals for the Sixth Circuit on June 15, 1990. Chief Judge Merritt, Judges Keith and Jones comprised the panel on appeal. The Panel, in a 3-0 unanimous decision, reversed the trial court, and ordered the evidence suppressed in a decision filed and entered on October 25, 1990.

The United States of America, after receiving an extension of time, filed a Suggestion for Rehearing En Banc to which the Petitioner was requested to respond, which he did in a timely fashion. The en banc review sought by the United States was granted on February 15, 1991, and the original panel decision was thereby vacated.

This case was orally argued May 22, 1991, before the Sixth Circuit United

States Court of Appeals sitting en banc. The panel, comprised of 12 Judges, on February 10, 1992, filed its split decision affirming the District Court's ruling.

H. STATEMENT OF THE FACTS

On October 3, 1988, at approximately 7:00 p.m. (CST), your Petitioner, Eddie Louis Taylor, a male black, was a passenger arriving at Memphis International Airport from Miami, Florida. (T.R. 8, 343, 344, 346) The Petitioner, who was dressed in dark maroon slacks, a work shirt, and a hat, exited the plane in the "B" Concourse, Gate 19 of the airport, at which time he turned left and walked through the terminal toward the main concourse baggage area. (T.R. 8, 44, 346, 381, 382) Three (3) police officers assigned to the Memphis Police Department Drug Task Force, who had no forewarning or alert that controlled substances and/or a "drug courier" were on the flight, elected separately to pursue the Petitioner. (T.R. 9) There was no oral agreement

among the officers, nor were any words between the officers spoken to effectuate a consensus that the Petitioner was indeed a worthy suspect to surveil. (T.R. 43, 71, 213) To the best of the officers' knowledge, Mr. Taylor was the sole black person on this flight. Officer Bevel, one of the officers, testified that seventy-five (75%) percent of the citizens that the Memphis Police Department Drug Task Force pursue and stop in the Memphis International Airport are black. (T.R. 211) Sergeant Joe Eldridge, the leader of three officers in this incident, admitted to having very little or no specific training in identifying drug couriers, and had been assigned to this task force for only six (6) months at the time of Mr. Taylor's arrest. Sergeant Eldridge first began pursuit of the Petitioner

immediately as he exited the gate area. (T.R. 7, 8, 34, 40)

The Petitioner testified that he was carrying a tote bag, walking at a somewhat brisk pace, and was totally unaware that anyone was surveiling and/or pursuing him. Officer Eldridge testified that it was not at all unusual for citizens to walk at a fast pace through the Memphis airport. (T.R. 47-48) After the Petitioner had exited the main terminal building, and walked outside to the edge of the curb of the street across which was the airport parking facility, he was encircled and contained by the three (3) police officers who had followed him through the airport terminal. (T.R. 347, 349) Sergeant Joseph Eldridge first approached the Petitioner as he was stepping from the curb, by physically grabbing and/or

forcing the Petitioner back from the street curb, causing the Petitioner to back up approximately six to eight feet until he was physically against the airport terminal building and exterior wall. (T.R. at 138, 322) Sergeant Eldridge then shoved his police badge into the Petitioner's face, thereby making his service revolver clearly visible, and ordered the Petitioner to stop because he "wanted to talk with him." (T.R. 16, 349, 350, 354) Seconds later, Officers Bonnie Bevel and Forest Roberts arrived on the scene. Officer Bevel closely flanked the Petitioner and Officer Roberts quickly assumed an encircling and containment position across the street, intentionally positioning himself between the Petitioner, the other two officers, and the airport public parking lot, where the

Petitioner's private automobile was located and the direction in which the Petitioner was attempting to and would have to travel to leave the airport facility. (T.R. 138, 322, 357) Officer Bevel then interrogated and examined the Petitioner with a litany of potentially incriminating questions. (T.R. 239-244, 355, 358, 359)

The Petitioner was instructed by Sergeant Eldridge to produce personal identification and his plane ticket for the officers to inspect, and he complied. Both the airline ticket and the Petitioner's driver's license, which were taken from him by the officers, matched the description of the Petitioner, and each contained his true name, Eddie Louis Taylor, on them. Further, his driver's license contained the Petitioner's

photograph. (T.R. 16, 17) The officers did not return the Petitioner's identification to him. At no time during this examination and interrogation by these police officers was the Petitioner ever advised that he was free to go, or that he was not compelled to speak to these officers or consent to a search of his personal effects. (T.R. 94)

In fact, Officer Eldridge clearly and unequivocally testified that he wanted the Petitioner to believe that he had to cooperate. (T.R. 95) Eldridge further testified that if the Petitioner would have attempted to leave at the point of the officers' initial contact with him and prior to any controlled substances being discovered, that he would have pursued him and given chase. (T.R. 98, 105-106) (Emphasis added)

Also, during this time, the Petitioner, Eddie Louis Taylor, testified that the officers, while interrogating him, "crowded" him and moved him six to eight feet from the edge of the curb up against the wall of the airport terminal. (T.R. 366-367) The officers clearly and graphically corroborated this portion of the Petitioner's testimony in their hand drawn pictorial diagrams found in Exhibits 4 and 5 to their testimony. (See Exhibits lodged with Clerk)

Officer Bevel next grabbed Taylor's bag by the strap, while it was still hanging from Taylor's shoulder. She then alleged that she requested permission to look inside. The Petitioner did not orally respond. The Petitioner placed the bag on the ground, unzipped it, shuffled papers around in it, and said, "There is

nothing in there that you're looking for." At this point, the officers admit that they did not see or observe any suspicious item in the bag. (T.R. 99) Officer Bevel then bent down to where the bag was and began searching it without the consent of the Petitioner. (T.R. 361, 362, 394-396) At no time to this point in the encounter did the officers ever advise the Petitioner that he was free to leave, or that he did not have to answer their interrogation, or be detained by them. (T.R. 365) The Petitioner also testified that he at no time felt or believed that he was free to leave due to the fact that the officers had him "crowded" and pinned against a wall, were barraging him with incriminating questions, and had displayed their firearms. Officer Bevel, during her search of the bag, found two packages

wrapped in paper and packing tape. (T.R. 363-364)

At this point, the officers continued to interrogate the Petitioner about what was in these unopened packages. The Petitioner was subsequently taken to the security office maintained by the Memphis Police Department Drug Task Force at Memphis International Airport. (T.R. 118, 371-372)

In the security office, the three police officers tried to coerce the Petitioner into signing a written statement and into executing a written Consent to Search Form, each of which request was refused by the Petitioner. The Petitioner requested several times an opportunity to call a lawyer, but was refused by the officers. (T.R. 374-376, 398) Even though the Petitioner herein

refused to sign a written consent form, and no search warrant was ever requested, authorized and/or procured, the officers proceeded to cut into a portion of the wrapped packages, and removed their contents to perform a drug field test. (T.R. 192)

The substance in the packages was field tested for controlled substances, and it tested positive for cocaine. (T.R. 30)

The Petitioner was thereafter advised that he was under arrest and subsequently charged with Violation of Title 18, United States Code, Section 841, et seq.

I. ARGUMENT

I.A.1. The black race constitutes a "suspect" class. Any government action singling out a person on the basis of race or "suspect" class must be given the strictest scrutiny. Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507, 109, S.Ct. 706, 102 L.Ed.2d 854 (1989).

Further, "discriminatory enforcement of the law by the government has traditionally been condemned." Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); Korematsu, supra. Not only did the en banc panel fail to condemn the officers' actions or give their conduct "strict scrutiny" based upon the objective facts before them, they declined to even address the issue in any proper

legal context, despite the clear and unequivocal admissions of the officers that they had been disproportionately targeting blacks or African Americans for allegedly consensual interviews and/or stops at the airport.

In the case at bar, the trial court record strongly demonstrates that law enforcement personnel with the City of Memphis Police Department are discriminately enforcing narcotics laws against blacks or African Americans and other minorities in the Memphis International Airport.

Officer Bonnie Bevel, one of the three white police officers who stopped and detained the Petitioner, testified that 75% of those persons targeted for an investigatory stop, or so-called "consensual interview," by her task force

are black citizens. (Transcript of Motion to Suppress at 211; Joint Appendix at 117)

Officer Britt Roberts testified that, of his last 10 stops and arrests, 6 were black, 2 were Cuban, and the other 2 were Italian. (T.R. at 302) Officer Roberts went on to testify that the airport task force stops "many, many more blacks" than caucasians. (T.R. at 302-3) Officer Roberts also testified that the Petitioner was the only black man to deplane and that Petitioner's "color" was clearly a determinative factor in deciding whether or not to stop and interrogate him.

> "Again, I say his overall appearance, the fact he was certainly different in appearance, whether you go from color or clothes to tennis shoes, whatever, you take all these factors together."
>
> T.R. at 300.

Further, it has been clearly demonstrated that only 5% of all air travelers in 1988,

in the geographic area which includes Memphis, Shelby County, Tennessee, were black.[1]

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[1] A written request by the 6th Circuit instructed your Petitioner to locate and present statistics showing the racial makeup of air travelers at Memphis International Airport. The Petitioner researched but could not locate separate data for the Memphis International Airport; however, Petitioner did locate a 1989 Air Transport Association Survey conducted by the Gallup Organization that encompassed the geographical region in which Memphis, Shelby County, Tennessee, is located, and, further, the survey data was compiled during the time in which Petitioner was arrested, i.e. October, 1988. Your Petitioner then properly filed a Request for the Appeals Court to take Judicial Notice Pursuant to Federal Rule of Evidence 201, same which was granted by the Court, and because Petitioner was permitted to argue the statistical data before the en banc panel. (See Advisory Committee Notes to Rule 201(f) which allows appellate courts to take judicial

Despite these clear, concise, and unrebutted objective facts contained in the record, the majority of the en banc panel determined that there were no facts in the record that would support "a finding that the conduct of the officers in this case gave rise to due process and equal protection considerations."

> A review of the suppression hearing transcript, the briefs and arguments of counsel before the trial court and initially before this court, disclosed no charge that the appellant herein had been selected for a consensual interview because he was an African-American, that the law enforcement officers at the Memphis Airport implemented a general practice or pattern that primarily targeted minorities for consensual interviews, or that they had incorporated a racial component into the drug courier profile. A factually supported record of such charged official conduct in the instant case would have given rise to due process and equal protection constitutional implications cognizable by this court.

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notice.)

Taylor, at 578-9. (Underline emphasis added)

Clearly, based upon the foregoing facts, the majority of the en banc panel has erred in finding the record insufficient to invoke the protections of the 5th and 14th Amendments.

> "The disproportionate number of African-Americans who are stopped indicates that a racial imbalance against African-Americans does exist and is implicitly sanctioned by the law enforcement agency. The assumption that seventy-five percent of those persons transporting drugs and other contraband through public modes of transportation are African-American is impermissible. It flies in the face of reason and legitimates a negative stereotype of African-Americans. Surely, this practice must be subjected to the strictest scrutiny and [can be] justified only by the weightiest of considerations.' Rogers v. Lodge, 458 U.S. 613, 619, 102 S.Ct. 3272, 3276, 73 L.Ed.2d 1012 (1981). If our 'right of locomotion', 'right to be let alone,' or simply our right to be free from capricious and arbitrary government interference in public places is to mean anything, then this race-based practice must stop. See

generally, The Decline of the Right to Locomotion, 75 Cornell L.Rev. at 1260-64.

> We cannot allow law enforcement officers to cloak what may fairly be characterized as a racist practice in a generic drug courier profile that openly targets African-Americans. The actions of these officers were particularly egregious."

United States v. Taylor, at 581-2 (dissenting opinion of Judge Keith). See also United States v. Ceballos, 654 F.2d 177, 185-6 (2d. Cir. 1981).

I.A.2. The majority further compounded their error by holding that due process and equal protection can be vitiated by a citizen subsequently consenting to consensual interview.

> In summary, this court concludes that because the district court -- in factual findings anchored in credibility assessments--expressly determined that the initial curbside encounter between Taylor and the officers was consensual, and because the district court also expressly concluded that the initial search of Taylor's bag was equally consensual and uncoerced, it is unnecessary to consider or decide either the

> specific factual question of whether the officers' surveillance of Taylor was motivated to any degree by his race, or the broader constitutional issue of whether the alleged incorporation of a racial component into the DEA's drug courier profile would, if true, violate an individual's rights to due process and equal protection of the laws.
>
> [Emphasis added]
>
> United States v. Taylor, at 578.

The majority of the en banc panel provides no case law or authority for their inescapable holding that subsequent consent can vitiate or waive 5th and 14th Amendment due process and equal protection rights.

To the contrary, the Sixth Circuit completely ignored its own precedents.

United States v. Kelly, 913 F.2d 261, 265 (6th Cir. 1990), was a case where the voluntariness of a defendant's consent was at issue, and the Sixth Circuit held that, even if the government proves that consent

was given freely, voluntarily, and uncontaminated by any duress or coercion, unlawful conduct by law enforcement officers vitiates any consent where the unlawful conduct precedes any consent. This view is shared by other circuits. United States v. Miller, 821 F.2d 546 (11th Cir. 1987); United States v. Ballard, 573 F.2d 913 (5th Cir. 1978).

Your Petitioner submits and avers that the Sixth Circuit has erred and that the protections and strict scrutiny review standards applied to the 5th and 14th Amendments of due process and equal protection under the law clearly override any "consensual" 4th Amendment issues, and cannot be vitiated by subsequent consent.

The majority opinion poses a most frightening question: If the 4th, 5th, and 14th Amendment rights can be vitiated

by subsequent consent, despite the unlawful conduct of law enforcement, which constitutional rights are going to be the next to fall by the wayside despite law enforcement's unlawful acts?

II. In Florida v. Bostick, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991), this Honorable Court held that under the "right to inquire rule" or "consensual interview" rule, a police officer may approach an individual and ask general questions of that individual "so long as a reasonable person would feel free to disregard the police and go about his business," and "as long as police do not convey a message that compliance with their requests is required." Bostick, at 2386.

The Sixth Circuit firmly established this rule in United States v. Flowers, 909 F.2d 145 (6th Cir. 1990). The en banc

court in the instant case, however, failed to take into consideration the objective facts before it that showed the district court's findings of a "consensual interview" was clearly erroneous.[2]

The officers' own testimony about their attitudes, interrogation, and physical positioning during the initial encounter on the curb with the Petitioner clearly belie the characterization of the stop as a consensual interview, and

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[2] "Clearly erroneous" was the standard of review applied by the en banc panel. Anderson v. City of Bessemer, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985), was cited as authority for this standard of review. Your Petitioner, however, as shown, infra, submits that the standard of review is de novo upon the entire record. In either case, your Petitioner avers an incorrect holding was handed down by the majority of the en banc court.

further belie the voluntariness of the interview as required by Schnecklothe v. Bustamonte, 412 U.S. 218, 227 (1973).

Sergeant Joseph Eldridge was the first to encounter the Petitioner as the Petitioner was about to step off the curb to cross the street. Sergeant Eldridge grabbed and/or physically moved the Petitioner off of the curb and back on to the sidewalk some 6 to 8 feet, up against the airport wall, where he was quickly joined by Officer Bonnie Bevel who intentionally flanked the Defendant opposite from Eldridge. (T.R. at 8, 44, 58, 138, 322, 346, 381, 382) Eldridge then pulled his badge and exposed his pistol so that Petitioner could view it. (T.R. 16, 349, 350, 354) The movement of the Petitioner off the curb, onto the sidewalk, and up against the wall and the

flanking and/or surrounding of the Petitioner was graphically corroborated by the officers' own hand drawn exhibits to their testimony. (See lodged Exhibits)

A third officer, Britt Roberts, in the meantime had intentionally positioned himself across the street between the Petitioner and the parking lot to which the Petitioner was headed, thereby encircling the Petitioner and assuring that he could not under any circumstances leave the area and/or get away from officers of the Airport Drug Task Force.

The Petitioner, flanked by 2 officers and with his back to the wall, was then interrogated by the officers with a litany of questions.

"Where are you coming from?"

"What is in the bag?"

"Do you know anybody in Memphis?"

"Are you meeting anybody in Memphis?"

"Where are you going?"

"Do you have a contact in Memphis?" During this interrogation the officers took his driver's license and kept possession of it. (T.R. 239-244, 355, 358, 359)

It is uncontroverted in that at no point was the Petitioner informed he was free to walk away. Sergeant Eldridge further clearly testified and admitted that he intentionally acted in such a manner so as to make the Petitioner believe that he had to remain and cooperate and that, prior to Officer Bevel's discovering any suspect object or contraband in the tote bag, that if the Petitioner had attempted to leave, he would have chased and pursued him until Petitioner Taylor was stopped and

detained. (T.R. 95, 98, 105) The revealing testimony of Sergeant Eldridge that he would have chased Petitioner Taylor down went as follows:

> Q. Okay. You would have just given pursuit but you wouldn't have tackled?
>
> A. Oh, yeah. I would have kept after him. ...
>
> Q. Would you have just given pursuit?
>
> A. Given pursuit.
>
> Q. What would you have done if you caught up with him and patted him on the back and said that was a fun run like this one through the airport, is that what you are telling this judge under oath in a Federal District Court?
>
> Q. You knew right then as you said that, if he tried to move, if he tried to run, at that point that you were going to stop him, you were going to give pursuit?
>
> A. No, sir. I said I would probably give pursuit. I didn't say that I would stop -- I would probably give pursuit.

Q. Why would you give pursuit if you weren't going to stop, so you could run along and get your exercise?

A. No, sir, I would follow him to where he was going.

Q. Follow him to where he was going?

A. You, sir, I got into -- he tried to get into a car, possibly get in my car. If he took off, I would try to get some kind of communication and have somebody pull in behind him for some more surveillance.

Q. You would try to get him stopped?

A. Definitely. Somebody at this point, they are definitely involved in something if they take off running.

Q. They are definitely involved in something.

A. Yeah.

Q. No question one way or another, you wanted to go in that bag and search him right then and there, you knew that, didn't you?

A. Yes, sir. ...

Under the Bostick rationale and under the totality of the circumstances, no reasonable person, when flanked in such a confining manner by three drug task force officers who had moved him back from the curb some 6 to 8 feet so his back was to the wall and bombarded him with a litany of incriminating questions, would feel free to disregard the police and go about his business.

Further, it also is clear from the foregoing irrefutable facts that the officers intentionally conveyed to the Petitioner that compliance with their requests was mandatory and required. Clearly, this was not a "consensual interview" situation as described in Bostick, supra, and Flowers, supra, and the majority of the Sixth Circuit erred in

not finding the District Court's ruling clearly erroneous.

It is these same set of facts that also conclusively demonstrate that the Petitioner was "seized" for Fourth Amendment purposes on the sidewalk prior to the finding of the two wrapped bundles.

In United States v. Mendenhall, 466 U.S. 544, 552 (1980), this Honorable Court first clearly enunciated the test for determining when a seizure has occurred, and the Sixth Circuit Court of Appeals adopted this test in United States v. Saperstein, 723 F.2d 1221 (6th Cir. 1983). That legal test, and the corresponding conclusion of law upon which the court must arrive, is whether, under the totality of the circumstances, a reasonable person would have believed he or she was free to walk away when

approached and questioned by law enforcement officers. Id.; United States v. Grant, 920 F.2d 376, 382 (6th Cir. 1990).

Also, a seizure can occur if law enforcement acts or positions itself in such a way so as to impede the progress of an individual, to exert physical force against an individual, or to make a show of authority against an individual, or to exert themselves in such a way so as to restrain the individual's liberty without actually touching him. California v. Hodari D., ___ U.S. ___, 111 S.Ct. 1547, 1551-2, 113 L.Ed.2d 590 (1991).

Further, it has been the longstanding law of this Court that conclusions of law such as this one at issue are clearly reviewable de novo upon the entire record so as to maintain uniformity of decision.

Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); United States v. McConney, 728 F.2d 1195 (9th Cir. 1984), cert. denied, 469 U.S. 824, 83 L.Ed.2d 46, 105 S.Ct. 101 (1985). This is especially true where constitutional questions, as the one at bar, are involved. Id.

This Honorable Court, in McConney, in deciding whether there were exigent circumstances present to legalize a warrantless search stated:

> The predominance of factors favoring de novo review is even more striking when the mixed question implicates constitutional rights. In cases involving such questions, the application of law to fact will usually require that the court look to the well defined body of law concerning the relevant constitutional provision. Thus, the Supreme Court has held that the mixed question of law and reviewed de novo. See e.g. Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). This holding implicitly recognizes that the inquiry involved

> in applying the probable cause standard goes well beyond the facts of the case and requires consideration of the abstract legal principles that inform constitutional jurisprudence. A similar recognition, though it may be unarticulated, seems to underlie cases in which our court has reviewed as questions of law such mixed questions as to the reasonableness of certain restrictions on first amendment rights. Ellwest Stereo Theatres, Inc. v. Wenner, 681 F.2d 1243 (9th Cir. 1982); whether there was a "search" in an INS sweep of a factory, International Ladies' Garment Workers' Union v. Sureck, 621 F.2d 624 (9th Cir. 1982), cert. granted sub nom. Immigration and Naturalization Service v. Delgado, ___ U.S. ___, 103 S.Ct. 1872, 76 L.Ed.2d 805 (1983); and whether a post-deprivation hearing within forty-eight hours following the seizure of property conformed to fourteenth amendment due process requirements, Goichman v. Rheuban Motors, Inc., 682 F.2d 1320 (9th Cir. 1982) (Emphasis added)

In Ker and in McConney, the predominant issue was, as in the case at bar, the legality of a warrantless search and seizure, and in each case the appellate courts properly and permissibly

reviewed the case de novo upon the entire record and totality of the circumstances to determine if all the application of the law to the facts made by the trial court were correct, and that the "searching" and "seizing" law enforcement agency did so search and seize within the bounds of the protections of the Fourth Amendment.

In the case at bar, the trial court, in its written Order Denying Motion to Suppress Evidence (Record Entry No. 20), simply concluded, despite the overwhelming evidence and testimony to the contrary, and without citing any supporting basis in fact or evidence, that Mr. Taylor, the Petitioner, "was actually arrested when the cocaine was discovered in the tote bag. At that point he was not free to leave the presence of the officers." From the District Court's vague statement, it

is impossible to know if the court meant the arrest took place outside the airport terminal when officers found two tightly wrapped packages, or later, in the airport security office (when the officers cut into the packages and field tested the substance contained therein).

Your Petitioner strenuously asserts and maintains that this cursory conclusion of law by the trial court is wholly unsupported by the uncontradicted, admitted facts and testimony in this cause that were known to the officers prior to the unlawful search of the Petitioner's tote bag and, further, that the encounter between the officers and the Petitioner was never a Terry stop, but, based upon the testimony of Sergeant Joe Eldridge, was an intentional arrest and constitutionally impermissible seizure

from the moment of the initial approach by law enforcement officers. Terry v. Ohio, 392 U.S. 1 (1968).

Under the totality of the circumstances, no reasonable person, when questioned, flanked in a confining manner by three drug task force officers who had kept his identification, was forced to move by them back up against a wall, and bombarded with a litany of incriminatory questions, would believe he or she was free to walk away, especially where these officers have testified that they had no intentions whatsoever of allowing the Petitioner to leave. Therefore, constitutionally, the "seizure" of the Petitioner, Eddie Louis Taylor, conclusively occurred immediately as the encounter with the officers began on the sidewalk outside the Memphis International

Airport terminal and, contrary to the trial judge's unsupported conclusion of law, this impermissible "seizure" and substantive arrest clearly occurred prior to the discovery of any suspect object and/or controlled substances by the three officers.

The next issue which must be addressed is whether this seizure was legally permissible.

Pursuant to the well reasoned holding of United States v. Cortez, 449 U.S. 411 (1981), the seizure of the Petitioner was legally impermissible as it violated the Petitioner's constitutional right to be free from unlawful searches and seizures.

In Cortez, this Honorable Court enunciated a two-prong test to determine the legality of the seizure of a defendant who allegedly fits the prophylactic "drug

courier profile," which the officers testified was the reason why they followed and confronted the Petitioner.

Prong one provides for trained law enforcement officials to use objective observations to draw reasonable inferences in light of their special experience and expertise. Id, at 418.

The uncontradicted objective information available to these patently untrained officers in the case at bar was that the Petitioner was a black male travelling alone to the nearest major airport to his home in Caruthersville, Missouri, was travelling from Miami, had photo identification and a plane ticket in his true name, walked quickly through the airport, looked over his shoulder, was dressed in clean work clothes, and, in the officers' opinion, acted nervous. The

officers had no tip from a confidential informant that the Petitioner or someone else on the flight was transporting a controlled substance. (T.R. 9) No police drug sniffing dog had tipped off the Petitioner's luggage.

Further, Sergeant Eldridge, the leader of the team that stopped and searched the Petitioner, had worked for the drug task force for only six months and clearly admitted that he had no special expertise or training in the identification of potential drug couriers and clearly stated that he did not even know what a "drug courier profile" was. (T.R. 7, 8, 34, 40) This obvious and fully admitted lack of training and knowledge decreases further the Cortez requirements of the import of expertise in the law enforcement officers' evaluation

and gathering of the objective information.

The second prong of Cortez states that these objective observations, in light of all the circumstances, including the training of the officers in drug interdiction, must raise an articulable suspicion that the particular individual being stopped is engaged in wrongdoing. Id.

The fact that a person is "...travelling from a source city or is nervous ha[s] been characterized as inherently unsuspicious." United States v. Saperstein, 723 F.2d 1221, 1228 (6th Cir. 1983). Additionally, the fact that a person does not stop for luggage and walks briskly through an airport is behavior innocent travellers engage in, and that

fact was readily admitted by Sergeant Eldridge and the other officers.

Further, this Honorable Court held in Reid v. Georgia, 448 U.S. 438 (1980), that the short duration of a trip is behavior consistent with innocent business commuters.

Additionally, this Honorable Court in Reid noted that the purpose of purchasing an airline ticket for cash was so that a purported drug courier could retain anonymity. However, in the case at bar, the Petitioner clearly and admittedly purchased the ticket in his own true name, and had personal identification to prove it.

The articulable factors in the case at bar outlined above would not even lead an agent trained in drug courier detection to any reasonable suspicion that the

Petitioner, Eddie Louis Taylor, was engaged in some sort of criminal activity, much less lead Officer Eldridge, who did not even know what a "drug courier profile" was, to such a suspicion.

Therefore, your Petitioner asserts that he did not match any facet of the prophylactic drug courier profile, and further submits that the totality of the circumstances as known to these patently untrained officers did not and could not yield a particularized suspicion which warranted a constitutional seizure of the person of the Petitioner based on a reasonable and articulable suspicion of criminal activity. The existent combination of objective factors observed by these officers could not even substantiate in them a "hunch" that the Petitioner was engaged in an illegal

activity, and, therefore, constitutes an unlawful search and seizure.

III. The trial court came to the unsubstantiated and explained conclusion of law that valid consent had been given by Mr. Taylor to the officers to allow them to search his tote bag. As shown, supra, in this Brief, such conclusions of law are clearly reviewable de novo upon the entire record by this Honorable Court. Ker v. California, supra; United States v. McConney, supra.

Even if this Honorable Court determines that the seizure of the person of Petitioner Taylor was permissible, your Petitioner asserts he never gave verbal, written, and/or any consent whatsoever for the officers to take his tote bag from his possession and control and/or search said

tote bag, and, therefore, a search warrant was legally essential to search.

Whether actual and legal consent to search was given as a matter of law rests upon an analysis of the totality of the circumstances surrounding the alleged consent. Schneckloth v. Bustamonte, supra at 227.

This Court has clearly held that "[c]onsent must be proved by clear and positive testimony and must be unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion." The prosecution has the burden of proving that consent was given freely and voluntarily. United States v. Kelly, supra at 265; United States v. Cooke, 915 F.2d 250, 252 (6th Cir. 1990); United States v. Williams, 754 F.2d 672, 674-5 (6th Cir. 1985). (Emphasis added)

In United States v. Mendenhall, supra, this Honorable Court held that "[a]lthough the Constitution does not require proof of knowledge of a right to refuse as the sine qua non of an effective consent to a search, ...such knowledge was highly relevant to the determination that there had been consent." Id. at 558-559. (Emphasis added)

The burden on the government to prove voluntary consent becomes much heavier following a constitutionally impermissible seizure.

"In addition to proving valid and voluntary consent to search, the government must also establish the existence of intervening factors which prove that the consent was sufficiently attenuated from the illegal stop." United

States v. Melendez-Gonzales, 727 F.2d 407, 414 (5th Cir. 1984). (Emphasis added)

Further, the law is quite clear that consent given after unlawful treatment is generally not valid. Kelly, supra at 265. (Emphasis added)

Additionally, unlawful conduct by law enforcement officials vitiates any consent where the unlawful conduct precedes any consent. Kelly, citing United States v. Miller, supra at 546; United States v. Thompson, 712 F.2d 1356 (11th Cir. 1983); United States v. Ballard, supra at 913.

Further, alleged consent obtained under duress, especially after an illegal arrest, "does not vitiate the illegality of the arrest." United States v. Jefferson, 650 F.2d 854, 858 (6th Cir. 1981).

The trial court, in its written Order Denying Motion to Suppress Evidence, stated that the Petitioner "consented to the search of his tote bag." However, the Order does not address the pivotal question concerning when or where such consent was given, nor did it address whether the consent was a result of coercion or duress on the part of the officers. Your Petitioner avers and states that the facts found in the trial court's Findings of Fact, and in the transcript of this cause, do not show any type of a valid consent pursuant to the case law and the law of the land.

When Officer Eldridge had chased the Petitioner down, grabbed his arm and/or forced him back against the airport wall, interrogated him, and asked to look in his tote bag, the Petitioner said nothing, but

he did put the bag down, unzipped it himself, juggled papers around, and said, "See, there's nothing in there." At that point the Petitioner stood up and Officer Bevel, who had come upon the scene when Officer Eldridge allegedly asked to search, and without saying a word to the Petitioner, began aggressively searching the tote bag, jerking all the contents of the bag out and throwing them onto the ground. (T.R. 361, 362, 394-396) Further, none of the officers could remember what the Petitioner said to make them believe they had his valid consent to search his bag. One officer heard, "Naw, go ahead," the other heard, "Okay." (T.R. 104, 243) Even if it is believed that Taylor answered, in some manner, affirmatively when asked about searching his tote bag, such alleged consent was

clearly a direct result of the duress and coercion of the three police officers intentionally making the Petitioner feel he was not free to leave -- in fact, was not free to leave and was already under arrest. This is evidenced by the officer's statement that they would have pursued him and chased him down prior to finding any suspicious objects and/or contraband, and their positioning themselves all around the Petitioner clearly intending to confirm and encircle him. At no point was the Petitioner advised that he was free to go and was not legally required to speak and cooperate with these arresting and threatening police officers. (T.R. 365)

Clearly, as the case law mandates, the Petitioner did not, and the government did not prove by clear and positive

evidence, that the Petitioner voluntarily consent to the resulting search at any time pertinent herein, or that the consent was "unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion." Kelly, at 265; Cooke, at 252. The Petitioner was not told he did not have to allow the search, nor did the government prove any intervening factors between the illegal arrest and seizure of the Petitioner, and the alleged consent.[3]

The continuing search of the tote bag in the Drug Task Force Office located at the airport was also clearly without the consent of the Petitioner. There was repeated testimony and evidence that the

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[3] This is not to argue that consent was ever verbalized. It is your Appellant's position that no consent of any kind whatsoever was ever given.

Petitioner was requested by the officers to sign a written Consent To Search Form, but that the Petitioner steadfastly refused. (T.R. at 172, 374-6, 398) No executed written Consent To Search Form was ever offered into evidence by the government, although the officers readily admitted that such written forms were clearly available at the airport office. Therefore, absent exigent circumstances, a warrant was legally necessary to lawfully search the Petitioner's tote bag and process samples for testing. United States v. Grant, at 389. A search warrant was never applied for and/or procured prior to, or even after, the opening of the tote bag, even though there was ample opportunity to do so due to the Petitioner's arrest and, therefore, the warrantless search must be presumed to be

impermissible. Katz v. United States, 389 U.S. 347, 357 (1967). This total failure and/or refusal to comply with the expressed constitutional warrant requirement absolutely exemplifies the very conduct that the exclusionary rule was promulgated to deter; therefore, the evidence against the Petitioner should have been suppressed. United States v. Owens, 782 F.2d 146, 152 (10th Cir. 1986); United States v. Grant, at 389.

Your Petitioner submits that the totality of the circumstances surrounding the alleged consent in the case at bar in no way clearly and unequivocally demonstrates and proves that the Petitioner intelligently gave any consent to any search of his tote bag and, therefore, the subsequent warrantless search must be determined to have

absolutely violated the Petitioner's constitutional right to be free from unlawful searches and seizures by these three police officers.

The Petitioner's very actions demonstrate that any consent he was alleged to have given was specifically limited to his own opening of the bag, revealing only the paper contents at the top of the bag, and then standing up. All actions thereafter taken by the police officers clearly exceeded the scope of what could be considered a permissible search. Walter v. United States, 447 U.S. 549, 656-7 (1980).

J. CONCLUSION

Predicated upon all of the abovesetout, your Petitioner, Eddie Louis Taylor, hereby respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari and allow him to file briefs and orally argue this matter.

Respectfully submitted,

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(2)

92-5792

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER, 1991 TERM

EDDIE LOUIS TAYLOR,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX

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RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 89-6396

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDDIE LOUIS TAYLOR,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Western District of Tennessee

Decided and Filed February 10, 1992

Before: MERRITT, Chief Circuit Judge, KEITH, KENNEDY, MARTIN, JONES, MILBURN, GUY, NELSON, RYAN, NORRIS, SUHRHEINRICH, Circuit Judges; and KRUPANSKY, Senior Circuit Judge.*

KRUPANSKY, S.J., delivered the opinion of the court, in which KENNEDY, MILBURN, NELSON, RYAN, NORRIS, and SUHRHEINRICH, JJ., joined. GUY, J. (pp. 13-15), delivered a separate concurring opinion. KEITH, J. (pp. 16-36), delivered a separate dissenting opinion, in which MERRITT, C.J., joined. MARTIN

*The Honorable Danny J. Boggs, Circuit Judge, took no part in the consideration or decision of the case.

(pp. 37-39) and JONES (pp. 40-43), JJ., delivered separate dissenting opinions.

KRUPANSKY, Senior Circuit Judge. Defendant-appellant, Eddie Louis Taylor (Taylor), appealed from an order of the district court dated June 30, 1989, denying his motion to suppress evidence discovered by officers of the Memphis, Tennessee police force during a search of his luggage at the Memphis International Airport on October 3, 1988. Subsequent to the trial court's decision, Taylor entered a conditional plea of guilty to one count of possessing with an intent to distribute 2 kilograms of cocaine, reserving his right to appeal the order denying suppression pursuant to Fed. R. Crim. P. 11(a)(2). Taylor was subsequently sentenced to serve 63 months in prison.

The record disclosed that on October 3, 1988, Taylor flew from Miami, Florida -- a high-level source city for drug distribution -- to Memphis. Taylor was the only African-American in the initial group of deplaning passengers. The record, however, does not disclose how many additional blacks were included in the steady stream of passengers leaving the aircraft at the Memphis terminal. As Taylor exited the jetway and entered the terminal corridor, he was observed by three plainclothes officers of the Memphis police department who were assigned to the department's Drug Task Force Unit. Without consulting each other, the three officers -- Joseph Eldridge (Eldridge), Bonnie Bevel (Bevel), and Britt Roberts (Roberts) -- tracked Taylor as he walked from the gate and down the concourse to the terminal's lower-level baggage claim facility. The officers testified that their surveillance was instigated by Taylor's obviously agitated conduct and appearance. Taylor was poorly attired, but carried a new bag over his shoulder. He proceeded rapidly -- at almost a running pace -- along the corridor, furtively scanning the course of his travel, including the area behind him. He proceeded directly to the curb without claiming any baggage, and was going in the

direction of a parking lot situated across the roadway from the terminal.

Eldridge approached Taylor short of the curb and identified himself as a police officer and solicited Taylor for an interview. In his testimony at the suppression hearing, Taylor contradicted Eldridge's version of the events and testified that Eldridge forcibly prevented him from proceeding toward his destination by grasping his elbow and propelling him backward to within several feet of the terminal building's facade. Taylor stated that he observed the officers' firearms, whereas the officers testified that their weapons were completely concealed. There is no dispute that Bevel had joined Eldridge and Taylor on the sidewalk, while Roberts had proceeded to a position across the roadway and adjacent to the parking lot.

In response to Eldridge's inquiries, Taylor volunteered that he lived across the river in Haiti, Missouri and that he had been in Miami for three weeks, but failed to explain the absence of additional baggage to accommodate his extended Miami visit. In further response to Eldridge's questions, Taylor voluntarily produced a one-way ticket from Miami to Memphis that had been purchased with cash, a driver's license with a name corresponding to that which appeared on the airline ticket. Taylor denied the officers' assertions that these items were, immediately subsequent to inspection, returned to him. As the conversation progressed, the officers observed that Taylor was "sweating profusely."

Bevel invited Taylor to permit her to inspect the contents of his shoulder bag. It is not disputed that, in response to this request, Taylor placed the carry-on bag on the sidewalk, unzipped it, riffled through some paper wrappings and other materials in the bag, and simultaneously assured Bevel and Eldridge that the bag contained nothing apart from gifts for his children, which would be of no interest to the officers. Taylor testified that after he shuffled the contents of the bag, he moved to

replace it on his shoulder, but that Bevel snatched it from his hand and prevented him from doing so.

Bevel contradicted Taylor by asserting that he voluntarily surrendered the bag upon her renewed solicitation to examine its contents. Bevel and Eldridge stated that Taylor responded "okay" or "naw, go ahead" and backed off, leaving the bag on the ground for Bevel to inspect. Bevel's inspection disclosed two large, spherical bundles wrapped in brown plastic tape, which both Bevel and Eldridge immediately recognized as packaging common to cocaine transportation. Upon this discovery, the officers directed Taylor to accompany them to the Drug Task Force Unit's office inside the airport terminal.

Subsequent to entering the office, Roberts advised Taylor of his *Miranda* rights. Bevel cut open one of the taped balls and chemically field tested its white, powdery contents. The substance tested positive for cocaine. Taylor was thereupon placed under formal arrest. Incident to the arrest, Eldridge searched Taylor's person and discovered $1,000 in cash hidden in each of his socks, and approximately another $900 in his wallet.

In his motion to suppress, Taylor argued that he was unreasonably "seized" within the meaning of the fourth amendment when the three law enforcement officers encountered him on the sidewalk adjacent to the airport terminal building. Taylor also charged that the officers lacked the level of suspicion required as a predicate to an investigative *Terry* stop,[1] and denied, in any event, that he had voluntarily conversed with the officers or had consented to Bevel's inspection of his carry-on bag, or to the subsequent chemical field testing of the contents of the taped balls. Taylor argued that all of the events that transpired subsequent to the initial curbside confrontation outside the terminal -- the search of his shoulder bag, his removal to the Drug Task Force Unit's office, the

[1] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968).

chemical field test of the contents of the taped packages, as well as his arrest and the search that disclosed the large amount of cash he possessed -- were the tainted fruit of the initial, allegedly illegal encounter.

In its opinion denying suppression, the district court credited the officers' version of events over Taylor's testimony, and concluded *as a matter of fact* that the initial conversation between the officers and Taylor, including Bevel's search of Taylor's shoulder bag, were consensual.

> The evidence shows Mr. Taylor consented to interview by the officers. The evidence shows he consented to the search of his tote bag. He, in fact, was in possession of two (2) kilograms of cocaine. Mr. Taylor was actually arrested when the cocaine was discovered in the tote bag. At that point, he was not free to leave the presence of the officers.

The court concluded, as a matter of law, that the arrest immediately subsequent to the discovery of the taped balls was supported by probable cause and did not violate Taylor's fourth amendment rights.

Recognizing that the fourth amendment protects citizens against "unreasonable searches and *seizures*," U.S. Const. amend IV (emphasis added), the Supreme Court and this Circuit consistently have admonished that not every encounter between a civilian and the police constitutes a "seizure" invoking fourth amendment safeguards. Relevant precedent has made clear that a seizure within the meaning and purpose of the fourth amendment does not occur when governmental agents approach a pedestrian, identify themselves as law enforcement officers, and solicit conversation or request an interview. *See, e.g., Immigration and Naturalization Service v. Delgado*, 466 U.S. 210, 215, 104 S. Ct. 1758, 1762 (1984) ("[t]he Fourth Amendment does not proscribe all contact between the police and citizens");

Florida v. Royer, 460 U.S. 491, 497, 103 S. Ct. 1319, 1324 (1983) (plurality opinion) ("law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place"); *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S. Ct. 1870, 1877 (1980) (plurality opinion) ("[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry"); *United States v. Cooke*, 915 F.2d 250, 251 (6th Cir. 1990); *United States v. Winfrey*, 915 F.2d 212, 216 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 709 (1991); *United States v. Kelly*, 913 F.2d 261, 264 (6th Cir. 1990) ("Initial questioning, without more, is not unlawful.").

Existing precedent teaches that a "seizure" occurs during a police-citizen encounter "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall*, 446 U.S. at 554, 100 S. Ct. at 1877; *accord Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S. Ct. 1975, 1979 (1988); *INS v. Delgado*, 466 U.S. at 215, 104 S. Ct. at 1762; *United States v. Grant*, 920 F.2d 376, 381 (6th Cir. 1990); *United States v. Saperstein*, 723 F.2d 1221, 1225 (6th Cir. 1983). "The finding that a citizen has been subjected to a fourth amendment search or seizure involves *a question of fact* and cannot be reversed unless clearly erroneous." *United States v. Grant*, 920 F.2d at 381 (emphasis added).

In the case at bar, the district court expressly determined that the initial contact between Taylor and the law enforcement officers consisted of no more than a consensual "interview."[2] The trial court's finding of fact

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[2]In reaching this factual conclusion, the district court credited the officers' version of events over that of Taylor, and, *a fortiori*, decided that a reasonable individual in Taylor's position would have felt free to ignore the officers' invitation to engage in a conversation, and proceed on his way. In this context, it is of no consequence that Eldridge testified that he would have pursued Taylor if he had fled. "The subjective intent of the officers is relevant to an assessment of the fourth amendment implications of police conduct *only to the extent that that intent has been conveyed to the person confronted.*" *United*

was predicated upon the credibility that the judge assigned to the witnesses after having personally evaluated their behavior and manner of testifying, the reasonableness of their testimony, their candor (or lack thereof), the accuracy of their memories, their respective interests or biases in the outcome of the proceeding, and all other indicia of truthfulness that are uniquely within the province of the factfinder -- be it judge or jury -- to assess.

Findings of fact anchored in credibility assessments are generally not subject to reversal upon appellant review. Clear error rarely occurs in the context of airport police-civilian encounters because resolution of fourth amendment issues in this milieu is "going to turn largely on credibility determinations made by the district judge at the suppression hearing." *United States v. Cooke*, 915 F.2d at 252. "Where there are two permissible views of the evidence, the factfinder's choice between them *cannot be clearly erroneous.*" *United States v. Rose*, 889 F.2d at 1494 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 1511) (1985) (emphasis added)). *Accord Hernandez v. New York*, 111 S. Ct. 1859, 1871-72 (1991). *See Anderson v. City of Bessemer City*, 470 U.S. at 573-74, 105 S. Ct. at 1511 (clearly erroneous standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case

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States v. Rose, 889 F.2d 1490, 1493 (6th Cir. 1989) (citing *Mendenhall*, 446 U.S. at 554 n.6, 100 S. Ct. at 1877 n.6) (emphasis added); *accord Smith v. Heath*, 691 F.2d 220, 223 (6th Cir. 1982). The record in the case at bar fails to disclose either directly or by implication that Eldridge conveyed his subjective intentions to Taylor.

Moreover, if Taylor had fled and thereby engaged the officers in hot pursuit, then he would not, in any event, have been "seized" during the time leading up to his actual, physical apprehension. This is so even if -- contrary to the facts of this case -- the officers' words and actions, *ab initio*, clearly conveyed to Taylor that he was not free to leave. *See California v. Hodari D.*, 111 S. Ct. 1547, 1551-52 (1991) (even if officer's conduct upon encountering suspect constitutes sufficient "show of authority" to apprise suspect that he is not free to leave, no seizure occurs if suspect fails to comply with that injunction and takes flight).

differently"); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S. Ct. 2678, 2696 (1989), *aff'g*, 842 F. 2d 825 (6th Cir. 1988); *Bose Corp. v. Consumers Union of U.S., Inc.*, 46 U.S. 485, 498-99, 104 S. Ct. 1949, 1958 (1984); *Batts v. NLT Corp.*, 844 F. 2d 331, 336 (6th Cir. 1988); *Sewell v. Jefferson County Fiscal Court*, 863 F. 2d 461 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 75 (1989); *Watson v. Fort Worth Bank & Trust*, 798 F. 2d 791, 798-99 (5th Cir. 1986), *cert granted, in part*, 483 U.S. 1004, 107 S. Ct. 3227, *motion denied*, 484 U.S. 961, 108 S. Ct. 448 (1987), *and vacated*, 487 U.S. 977, 108 S. Ct. 2777 (1988). *See also Mendenhall*, 446 U.S. at 557, 100 S. Ct. at 1879 (if trial court's factual finding on motion to suppress is sustained in the record, then appeals court is "mistaken for substituting for that finding its view of the evidence").

The district court's factual conclusion in the instant case that the initial encounter was not a "seizure" was factually supported by the record developed below, and was, as a matter of law, fully consistent with the published opinions of the Supreme Court and this court mandating that a "seizure" does not occur when officers approach an individual and, after identifying themselves, request an interview and an opportunity to inspect the individual's driver's license and airline ticket. *See, e.g., Mendenhall*, 446 U.S. at 555, 100 S. Ct. at 1877 (suspect "was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions"); *Winfrey*, 915 F.2d at 216 ("[t]he request for, and examination of, an airline ticket and driver's license do not amount to a seizure under the fourth amendment") (citing *Royer*, 460 U.S. at 501, 103 S. Ct. at 1326). While the test for a "seizure" is "'flexible enough to be applied in a whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police.'" *United States v. Cooke*, 915 F.2d at 252 (quoting *Michigan v. Chesternut*, 486 U.S. at 574, 108

S. Ct. at 1979). Failure to consistently apply this court's established seizure jurisprudence to substantively indistinguishable factual scenarios would seriously undermine the ability of a police officer acting within this judicial circuit to "'determine in advance whether the conduct contemplated will implicate the Fourth Amendment.'" *Id.*[3]

The district court also concluded as a matter of fact that Taylor consented to Bevel's search of his carry-on bag. The question of whether Taylor voluntarily tendered his shoulder bag for examination, or whether its inspection was the tainted product of unlawful duress or coercion, "is a question of fact to be determined from the totality of the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047-48 (1973). "'The district court's findings with regard to voluntariness will not be reversed unless clearly erroneous.'" *United States v. Rose*, 889 F.2d at 1494 (quoting *United States v. Jones*, 846 F.2d 358, 360 (6th Cir. 1988) (per curiam)). *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct.1504, 1511 (1985); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S. Ct. 2678, 2696 (1989), *aff'g*, 842 F. 2d 825 (6th Cir. 1988); *Bose Corp. v. Consumers Union of U.S., Inc.*, 46 U.S. 485, 498-99, 104 S. Ct. 1949, 1958 (1984); *Batts v. NLT Corp.*, 844 F. 2d 331, 336 (6th Cir. 1988); *Sewell v. Jefferson County Fiscal Court*, 863 F. 2d 461 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 75 (1989); *Watson v. Fort Worth Bank & Trust*, 798 F. 2d 791, 798-99 (5th Cir. 1986), *cert granted, in part*, 483 U.S. 1004, 107 S. Ct. 3227, *motion denied*, 484 U.S. 961, 108 S. Ct. 448 (1987), *and vacated*, 487 U.S. 977, 108 S. Ct. 2777 (1988). *See also Mendenhall*, 446 U.S. at 557, 100 S. Ct. at 1879 (if trial court's factual finding on motion to

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[3]The Supreme Court has repeatedly noted the importance of "providing 'clear and unequivocal' guidelines to the law enforcement profession." *Arizona v. Roberson*, 486 U.S. 675, 682, 108 S. Ct. 2093, 2098 (1988); *see also Acevedo v. California*, 111 S. Ct. 1982, 1990 (1991) (noting "virtue" of providing clear rules to law enforcement personnel).

suppress is sustained in the record, then appeals court is "mistaken for substituting for that finding its view of the evidence"). Proof of voluntary consent must be "by clear and positive testimony" and the consent must be proven to have been "unequivocal, specific, intelligently given, uncontaminated by any duress or coercion." *United States v. Williams*, 754 F.2d 672, 675 (6th Cir. 1985).

In determining that Taylor voluntarily consented to the search of his bag, the district judge again relied upon his personal observations of the witnesses and assigned greater credibility to the testimony of the officers than he assigned to that of Taylor, thus reaching a factual conclusion that was not clearly erroneous. As found by the district court, "the evidence shows [that Taylor] consented to the search of his tote bag." The consent was given unequivocally and, moreover, was uncontaminated by duress or coercion because it occurred within the context of a consensual conversation.

During her search of Taylor's bag, Bevel noted the presence of two spherical, tape-bound parcels, and immediately identified the packaging as that which is unique to the transportation of cocaine. Upon making this very incriminating discovery, the officers directed Taylor to accompany them to their office at the airport. The district court correctly concluded that Taylor was at that moment "seized" within the meaning of the fourth amendment. *See Florida v. Royer*, 460 U.S. at 501, 103 S. Ct. at 1326 (suspect seized when, among other things, officers asked him to accompany them to a police room and retained possession of his ticket and driver's license); *United States v. Garcia*, 866 F.2d 147, 151 (6th Cir. 1989) ("the one occurrence which seems to separate 'seizures' from casual contacts between police and citizens is when the defendant is asked to accompany the police or agents to a place to which the defendant had not planned to go").

At the point in time when the officers directed Taylor to accompany them to their airport office, they knew that

Taylor: had arrived in Memphis from a high-profile drug source city; had rapidly walked through the airport terminal; had glanced furtively in every direction as if conducting "counter-surveillance"; had no luggage beyond the new shoulder bag he carried, despite his asserted three-week sojourn in South Florida; had paid cash for his one-way air passage from Miami to Memphis; had acted nervously, sweated profusely, and had provided implausible answers to several of the officers' inquiries; and, notwithstanding his contention that his shoulder bag contained nothing but gifts for his children, was carrying two highly suspicious packages therein. Bevel's discovery of the taped balls, coupled with the full spectrum of facts known about Taylor when he was seized, not only gave rise to the reasonable suspicion necessary to subject Taylor to a limited investigative *Terry* stop, but, more importantly, also provided the officers with probable cause to arrest him. *See United States v. Sokolow*, 109 S. Ct. 1581, 1585 (1989) ("Probable cause means 'a fair probability that contraband or evidence of a crime will be found.'") (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)).[4]

In summary, this court concludes that because the district court -- in factual findings anchored in credibility assessments -- expressly determined that the initial curbside encounter between Taylor and the officers was consensual, and because the district court also expressly concluded that the initial search of Taylor's bag was equally consensual and uncoerced, it is unnecessary to consider or decide either the specific factual question of whether the officers' surveillance of Taylor was motivated to any degree by his race, or the broader constitutional issue of whether the alleged incorporation of a racial component into the DEA's drug courier profile would, if

[4]The existence of probable cause upon discovery of the taped balls renders academic any discussion of whether Taylor was subjected to a *Terry* stop or was arrested when he was taken to the police office.

true, violate an individual's rights to due process and equal protection of the laws.

A review of the suppression hearing transcript, the briefs and arguments of counsel before the trial court and initially before this court, disclosed no charge that the appellant herein had been selected for a consensual interview because he was an African-American, that the law enforcement officers at the Memphis Airport implemented a general practice or pattern that primarily targeted minorities for consensual interviews, or that they had incorporated a racial component into the drug courier profile. A factually supported record of such charged official conduct in the instant case would have given rise to due process and equal protection constitutional implications cognizable by this court.

Accordingly, for the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

GUY, Circuit Judge, concurring. Although I agree that the district court should be affirmed, I have a slightly different view of what we are doing and not doing in our en banc consideration of this case. When this case was in the district court, the contours of what Judge Krupansky refers to as the "consensual interview" doctrine were not as clearly outlined as they are today. For example, we had not decided *United States v. Flowers*, 909 F.2d 145 (6th Cir. 1990), which discusses the three different categories of police-citizen encounters.

The significance of this is the consensual interview theory had not permeated down to and been absorbed by the investigative agencies, and most airport search cases were being presented as "profile" cases. I believe that was the case here; however, the district judge correctly chose to classify the initial encounter as a consensual interview and then went on to hold there was no seizure. At this point in the analysis, the issue of race was not involved, since race was only implicated as a "profile" issue in the district court.

On appeal, the panel concluded, contrary to the district judge, that there was a seizure and then proceeded to work backwards and conclude there was no justifiable basis for the seizure. In the course of making the "justifiable basis" analysis, the issue of race entered the picture.

On en banc review, we now essentially conclude that the panel erred in substituting its judgment for that of the trial court on the factual issue of consent as well as substituting its credibility determinations for those of the district judge. This, to me at least, is the significant aspect of our en banc holding. This is not a case reviewed en banc for the purpose of clarifying airport search law, but it is one designed to reaffirm the principle that, although an appellate court may not like the result reached in the district court, it does not have carte blanche to change those results when "clearly erroneous" is the standard of review.

Although our decision to en banc a case has the effect of vacating the earlier panel decision and placing the district court decision directly before us for review, that is somewhat unrealistic in this case, because what is really being considered are the appropriate perimeters of appellate review. By substituting its judgment for that of the district court on the factual seizure and consent issues, the panel bootstrapped its way into the reasonableness discussion, which then arguably made legitimate the discussion of the race issue.[1] In short, I believe this case was set for an en banc consideration not to quarrel with the panel's treatment of the race issue, but to review the appropriateness of reaching the race issue.

Having said all of that, however, I now get to the real point of writing a concurrence when I agree with the decision to affirm. The majority opinion could be read as concluding that, where first encounters are consensual, racial considerations are irrelevant. I would disagree. If it were to be shown, for example, that the persons selected for consensual interviews are blacks, who are only stopped because they are black, then I would find the procedure raises serious constitutional concerns.[2] Thus, I share our original panel's concerns about a procedure that would target primarily minorities for consensual interviews, but I believe its good faith concern over this issue led to reaching and deciding an issue in a manner inconsistent with the normal scope of appellate review and

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[1]In the district court, the defendant filed two memoranda in support of his motion to suppress, and neither document mentioned race. Similarly, in defendant's initial brief to the panel that first heard this case, there was no mention of race.

[2]There are drug task forces in operation in this circuit which have for their primary purpose the interdiction of drugs from the Caribbean area. If their experience is that persons of color are usually used as couriers, such a task force might well select such persons as "targets" of consensual interviews without offending the Constitution. This example illustrates the importance of a proper record being made in the district court.

on the basis of a record never properly developed in the district court.[3]

[3]There was some effort made after the case was scheduled for an en banc hearing to expand the record and provide a basis for reaching beyond what was before the district court. Although we can expand the scope of legal issues before us, I believe it is improper to attempt to build a record different than that before the district court.

KEITH, Circuit Judge, dissenting; joined by Chief Judge Merritt; and Martin and Jones, Circuit Judges. Laying aside the legality of the seizure and the subsequent search of Taylor under established fourth amendment principles for the moment, the Drug Enforcement Agency ("DEA") personnel stopped Eddie Louis Taylor ("Taylor") in the Memphis airport on October 3, 1988 solely because he was an African-American. The majority opinion cavalierly dismisses this controversial and important fact and categorically concludes:

> [B]ecause the district court -- in factual findings anchored in credibility assessments -- expressly determined that the initial curbside encounter between Taylor and the officers was *consensual*, and because the district court also expressly concluded that the initial search of Taylor's bag was equally *consensual and uncoerced, it is unnecessary to consider or decide either the specific factual question of whether the officer's surveillance of Taylor was motivated to any degree by his race, or the broader constitutional issue of whether the alleged incorporation of a racial component into the DEA's drug profile, if true, violates an individual's rights to due process and equal protection of the law.*

Majority op. at 10-12 (emphasis added). We cannot accept the majority's evasive and cursory disclaimer or its characterization of this police-citizen encounter as "consensual and uncoercive" given the objective facts. We, therefore, must dissent.

I.

The record strongly indicates that racial assumptions provided the basis for the DEA officers' initial contact with Taylor. Clearly, the officers must operate within the dictates of the established fourth amendment doctrine for the proscription of "unreasonable" searches and seizures. *See Brown v. Texas*, 443 U.S. 47 (1979); *Delaware v.*

Prouse, 440 U.S. 648 (1979); *United States v. Brignoni-Ponce*, 442 U.S. 873 (1975); *Terry v. Ohio*, 392 U.S. 1 (1968). We acknowledge that the Supreme Court has recognized the existence of a threshold governmental practice whereby officers may stop citizens and secure cursory information. *Florida v. Bostick*, ___ U.S. ___; 111 S. Ct. 2382 (1991); *Florida v. Royer*, 460 U.S. 491, 497 (1983), *see also* Tracey Maclin, *The Decline of the Right to Locomotion: The Fourth Amendment on the Streets*, 75 Cornell L. Rev. 1258 (1990). In *Bostick*, the Supreme Court explained this "right to inquire" and firmly established that an officer may approach an individual and ask general questions of that individual (e.g., identification and request for consent to search his or her luggage), "so long as a reasonable person would feel free to disregard the police and go about his business" and "as long as the police do not convey a message that compliance with their requests is required." *Bostick*, 111 S. Ct. at 2386. Before reaching the *Bostick* inquiry, however, we would emphasize that the Constitution's fourteenth amendment prohibits state actors from denying persons the equal protection of the laws. U.S. Const. amend. XIV, sec. 1. *See also J.A. Croson Co. v. Richmond*, 488 U.S. 469 (1986) and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). Equal protection principles simply prohibit state actors from using a citizen's race to catalyze this "right to inquire."

Recently, the Fifth Circuit observed: "the heart of the equal protection clause is its prohibition of discriminatory treatment. If a governmental actor has imposed unequal burdens based upon race, it has violated the clause." *Samaad v. City of Dallas*, 940 F.2d 925 (5th Cir. 1991). The crucial distinction when applying equal protection principles is that made between government and private actors. *Reynolds v. Little Rock*, 893 F.2d 1004, 1008 (8th Cir. 1990).

Traditionally, any state action singling out a person solely on the basis of race has been given the strictest scrutiny, and generally, that action has been condemned

by the courts. *See, e.g., J.A. Croson Co. v. City of Richmond*, 488 U.S. 469, 507 (1989) (holding the City of Richmond's voluntary affirmative action plan was not "narrowly tailored to remedy prior discrimination," a compelling governmental interest). In *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme Court stated:

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact--in the jury cases for example, the total of seriously disproportionate exclusion of Negroes from jury venires--may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.

Id. at 242. *See also Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252, 266 (1977). While *Washington v. Davis* rejected the notion that a law is invalid under an equal protection analysis "simply because it may affect a greater proportion of one race than another", *Washington v. Davis*, 426 U.S. at 242, the Supreme Court was concerned with the practice of inferring a subjective, purposeful intent solely from statistical disparate impact. Here, not only does a disproportionate impact exist,[1] but also the DEA has all but reduced to writing a practice of singling out African-Americans for drug courier inquiries, a facially discriminatory policy. *See* Sheri Lyn Johnson, *Race and the Decision to Detain a Suspect*, 93 Yale L.J. 214, 234 (1983) ("Although the DEA has refused to commit the entire [drug courier] profile to writing, the profile clearly

[1]One of the officers admitted at the evidentiary hearing that at least seventy-five percent of those followed and questioned in these consensual police stops are black. *See* Joint Appendix at 117. Transcript at 211 (Officer Bevel testifying).

contains a racial component."). *See generally* Morgan Cloud, *Search and Seizure By The Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U.L. Rev. 843 (1985) (discussing the history and use of drug profiles).

The disproportionate number of African-Americans who are stopped indicates that a racial imbalance against African-Americans does exist and is implicitly sanctioned by the law enforcement agency. The assumption that seventy-five percent of those persons transporting drugs and other contraband through public modes of transportation are African-American is impermissible. It flies in the face of reason and legitimates a negative stereotype of African-Americans. Surely, this practice must "be subjected to the strictest scrutiny and [can be] justified only by the weightiest of considerations." *Roger v. Lodge*, 458 U.S. 613, 619 (1981). If our "right of locomotion", "right to be let alone," or simply our right to be free from capricious and arbitrary government interference in public places is to mean anything, then this race-based practice must stop. *See generally, The Decline of the Right to Locomotion*, 75 Cornell L. Rev. at 1260-64.

We cannot allow law enforcement officers to cloak what may fairly be characterized as a racist practice in a generic drug courier profile that openly targets African-Americans. The actions of these officers were particularly egregious. Taylor was one of the first few people to deplane the Miami flight. At the time that he was stopped, Taylor was the only black who had deplaned. In fact, the officers testified that they believed Taylor may have been the only black person on the flight. As we discuss below, their purported reasons for stopping Taylor were questionable.[2] The only truly objective fact

[2]For example, Sergeant Eldridge testified that Taylor appeared "different" from the other deplaning passengers because he was clad in clothing that was not typical of "the passengers that would come from Miami [on] flights in real casual nice looking clothes". This observation is inherently subjective and subject to great abuse.

that could have given rise to the officers' suspicion was that Taylor was black. Yet the majority ignores this clear evidence that the DEA agents, state personnel, targeted Taylor when it carried out its law enforcement duties.

We believe that facts show that the DEA singled out Taylor and stopped him solely because he was an African-American male. The majority, by refusing to address the clear evidence of race-based conduct, has endorsed the frightening proposition that a defendant's subsequent, alleged consent legitimates a governmental practice that violates the principles embodied in the equal protection clause. This court, in effect, permits a state actor to inject racist attitudes into the carrying out of what should be color-blind law enforcement. This court has embarked upon a dangerous journey by revisiting the practice of issuing "general warrants"[3] for police action. *See* Potter Stewart, *The Road to Mapp v. Ohio and Beyond: the Origins, Development, and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 Colum. L. Rev. 1365, 1369 (1983). Only this time, these "general" warrants have "specific" targets -- African-Americans. The use of an immutable characteristic as the basis of suspicion for criminal activity is patently unconstitutional,

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Anyone, especially the only African-American among the first few passengers to deplane, may appear "different".

[3]Described as the most powerful legal weapon against critics of the crown in pre-Revolutionary War England, these warrants were "issued without a showing of probable cause and often without suspicion of criminal wrongdoing; no particular individual was charged with violating the law; no name appeared on the warrants; and [they were] valid for the duration of the life of the monarch under whose name they were issued." Potter Stewart, *The Road to Mapp v. Ohio and Beyond: the Origins, Development, and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 COLUM. L. REV. 1365, 1369 (1983).

Former Justice Stewart asserts that the framers of the fourth amendment were wary of this practice and adopted the fourth amendment to guard against use of the general warrant to "jeopardize the liberty of every citizen." *Id.* We must be concerned that if we allow such a process to continue under the guise of a "war on drugs", we will be jeopardizing the fundamental liberty that the framers sought to secure.

and the notion that DEA agents and like state personnel can consider race in carrying out its duties is nothing short of outrageous and cannot be permitted.

A highly publicized example of the potential abuse to which such a practice is subject occurred in 1988 when baseball Hall of Famer Joe Morgan was accosted by state agents in the Los Angeles International Airport. L.A. Times, Aug. 11, 1990, at B6, col. 1. Morgan was on a layover during a trip from Oakland, California where he is a successful businessman, to Tuscon, Arizona, where he was to participate in a golf tournament. *Id.* While he was making a phone call, an officer approached Morgan and asked him for identification.[4] *Id.*

Although the events of the next few moments are in dispute, it is clear that Morgan attempted to identify himself;[5] and the officer grabbed Morgan, threw him to the floor, and handcuffed him before a crowd of onlookers. UPI Press Release, Feb. 15, 1991 (NEXIS, Los Angeles Dateline). The officer then led him away to a closed room with his hands over his mouth. *Id.* The officer testified in the civil suit brought by Morgan against the City of Los Angeles and the officer that he approached Morgan because the former baseball player acted suspiciously and threw him to the floor only after Morgan became belligerent. L.A. Times, Feb. 15, 1991, at B1, col. 2. After awarding Mr. Morgan $540,000 in compensatory and punitive damages, some jurors expressed the belief, however, that Mr. Morgan was singled out because he was black and that he was

[4]The officer later stated that he and a Drug Enforcement Agent were assigned to investigate drug smuggling activity at the Airport; and they thought that Morgan may have been travelling with another African-American man, Tony Floyd, whom the DEA had handcuffed nearby. Note that the agents found no drugs in Floyd's luggage or on Morgan's person. N.Y. Times, Feb 16, 1991, sec. 1, page 46, col. 5.

[5]A witness at trial also testified that he attempted to intercede and explain to the officer who Joe Morgan was. The officer rebuffed any such attempt and told the witness not to interfere. UPI Press Release, Feb. 15, 1991 (NEXIS, Los Angeles Dateline).

victimized by the officer. *Id.* Moreover, testimony in the civil suit indicated that when the officer led Morgan away he stated: "I'm an authority figure and I'm going to show you what authority is all about." *Id.*

The state may not separate all drug couriers into two classes--one black class and one white class-- and then adopt and execute a policy of enforcement against the black class only. The Second Circuit has explicitly rejected such a practice. *See United States v. Ceballos*, 654 F.2d 177, 185-86 (2d Cir. 1981). In *Ceballos*, the police attempted to justify an arrest by claiming that a defendant fit a "profile" of customers of suspected narcotics dealers because he was a "hispanic male." *Id.* Concluding that the government lacked probable cause to arrest Ceballos, the Second Circuit stated:

> [T]he government's contention that Ceballos fit an alleged "profile" of [a narcotic's dealers] customers (hispanic males) is an *inappropriate* attempt to broaden the limited acceptance which has been given to the DEA's drug courier profile in the context of airport *Terry* stops.

Id. (emphasis added).

We must recognize the wisdom of our sister circuit. Equal protection principles simply forbid this type of state action. The government, under the majority's rationale, legally can continue to engage in this type of race-based profile. The majority effectively holds that federal courts will not consider this volatile issue if subsequent consent by a defendant occurs or if the party has not yet been seized within the meaning of the fourth amendment. Yet the majority offers no citation of authority for the proposition that race discrimination in law enforcement is unreviewable or constitutional. We would be abdicating our judicial responsibility by endorsing a racist law enforcement policy, sub silencio. By refusing to address the racial element that is at the forefront of this case, the majority has deferred to a potentially abusive and

constitutionally impermissible practice. We simply cannot and will not join such an opinion.

II.

Additionally, Taylor contends that the district court erred in finding that he was not seized in violation of the fourth amendment. Taylor maintains that his fourth amendment rights were violated when the officers seized him on the sidewalk outside of the Memphis International Airport terminal. We agree.

A.

The fourth amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV. The fourth amendment requires the existence of objective justifications for all searches and seizures "including seizures that involve only a brief detention short of traditional arrest." *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). Although there are some circumstances under which a person may be detained briefly, without probable cause,[6] "any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid*, 448 U.S. at 440. *See also Brown v. Texas*, 443 U.S. 47, 51 (1979); *Delaware v. Prouse*, 440 U.S. 648, 661 (1979); *Brignoni-Ponce*, 422 U.S. at 878; *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968).

We recognize that our government is in the midst of waging a "war on drugs." Yet, the valiant effort of our law enforcement officers to rid society of the drug scourge cannot be done in total disregard of an

[6] *See United States v. Sokolow*, 490 U.S. 1, 7 (1989) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

individual's constitutional rights. In *United States of America v. Radka*, 904 F.2d 357 (6th Cir. 1990), we addressed this problem:

> Presently, our nation is plagued with the destructive effects of the illegal importation and distribution of drugs. At this critical time, our Constitution remains a lodestar for the protections that shall endure the most pernicious affronts to our society. . . . The drug crisis does *not* license the aggrandizement of governmental power in lieu of civil liberties. Despite the devastation wrought by drug trafficking in communities nationwide, we *cannot* suspend the precious rights guaranteed by the Constitution in an effort to fight the 'War on Drugs.'

Id. at 361 (emphasis added). Law enforcement officers cannot ignore the protections guaranteed by our Constitution -- law enforcement officers cannot subject individuals to random invasions of their privacy. *See Katz v. United States*, 389 U.S. 347 (1967) (discussing the expectation of privacy embodied in the principles of the fourth amendment).

Each case raising a fourth amendment issue "must be judged on its own facts." *United States v. Saperstein*, 723 F.2d 1221, 1227 (6th Cir. 1983) (quoting *United States v. Mendenhall*, 446 U.S. 544, 565 n.6 (1980)). Here, the initial issue to be resolved is whether Taylor was seized and, if so, when. The test for determining whether a seizure has occurred is "whether, under the totality of the circumstances, a reasonable person would have believed he or she was not free to walk away." *Saperstein*, 723 F.2d at 1225 (citations omitted). *See also Mendenhall*, 446 U.S. at 554; *United States v. Clardy*, 819 F.2d 670, 672 (6th Cir. 1987); *United States v. Lucci*, 758 F.2d 153, 155 (6th Cir.), *cert. denied*, 474 U.S. 843 (1985). Circumstances that might indicate a seizure, "even where the person did not attempt to leave, would be *the threatening presence of several officers*, the display of a

weapon by an officer, some *physical touching of the person* of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request *might be compelled.*" *Mendenhall*, 446 U.S. at 554 (emphasis added). *See also Terry*, 392 U.S. at 19 n.16.

The objective facts of this case indicate that the officers seized Taylor as he stood outside the airport and prepared to cross the street. Taylor testified that upon exiting the airport terminal, Officer Eldridge grabbed his arm and forced him back from the curb to talk to him:

> Q: Okay. Now, when was the first time that you knew that a police officer was following you?
>
> A: Well, I didn't really know that a police officer was following me at all. What I done, (sic) when I got ready to step off the sidewalk, as I got ready to step off the sidewalk, someone said, excuse me, sir. I didn't even bother to look back. And then they (sic) said, excuse me, sir, again. And as he said, excuse me, sir, the second time, he's pulling my arm, he's got me by the arm pulling me back. I am referring to Sergeant Eldridge. . . .
>
> Q: And the first time - - what were you, how were you physically standing in relationship to the curb or the sidewalk when this officer seized your elbow?
>
> A: I was standing right at the edge of it. My toes were almost on the edge, almost where they would hang off. I was standing there. And when this one car passed by, I started to step down. When I started to step down, that is when he pulled me completely back up on the sidewalk. . . .

Joint Appendix at 131-33. Transcript at 348-50. Taylor further testified that the officers surrounded him. The officers, albeit plainclothed, positioned themselves so that

Taylor could not pass.[7] Both Sergeant Eldridge and Officer Bevel asked Taylor a barrage of questions that he felt *compelled* to answer, particularly since he felt he could not leave. Moreover, on two separate occasions during the evidentiary hearing, Sergeant Eldridge testified that if Taylor attempted to leave at any point during the questioning -- *before* the cocaine was found -- he would have given pursuit.[8] This admission lends credence to the assumption that he communicated that intent to Taylor.

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[7]At the evidentiary hearing, Taylor testified that he felt he was not free to leave:

> Q: Were they [the officers] on either side of you or both on the same side of you or which way were they?
>
> A: They were in front of me at an angle . . . they had enough space . . . to where *I couldn't go between them.*

Joint Appendix at 137. Transcript at 357 (emphasis added).

[8]On cross-examination, Sergeant Eldridge testified:

> Q: Okay. You would have just given pursuit but you wouldn't have tackled?
>
> A: Oh yeah, I would have kept after him.
>
> * * *
>
> Q: [I]f he tried to move, if he tried to run . . . you were going to give pursuit?
>
> A: No, sir, I said I would probably give pursuit. . . . .
>
> Q: Why would you give pursuit if you weren't going to stop, so you could run along and get your exercise?
>
> A: No sir, I would follow him to where he was going.
>
> Q: Follow him to where he was going?
>
> A: Yes, sir . . . If he took off, I would try to get some kind of communication and have somebody pull in behind him for some more surveillance.
>
> Q: You would try to get him stopped?
>
> A: *Definitely. Somebody at this point, they are definitely involved in something if they take off running.*
>
> Q: They are definitely involved in something.
>
> A: Yeah.

Joint Appendix at 109, 111. Transcript at 98, 105 (emphasis added).

Accordingly, under the totality of the circumstances and factors enunciated in *Mendenhall*, a reasonable person would not have felt free to walk away. Several officers were present and positioned so that Taylor would reasonably understand that he was not free to go. Additionally, Officer Eldridge grabbed Taylor's arm and physically pulled him back onto the sidewalk. Finally, the officers asked Taylor a number of questions that clearly cannot be characterized as information solely for identification purposes such as that referred to in *Florida v. Bostick*, 111 S. Ct. at 2386. Therefore, we believe that Taylor was seized when he was stopped on the sidewalk outside of the terminal.

B.

Since the record clearly established that the officers seized Taylor, we must now determine whether the seizure was constitutionally permissible. For fourth amendment purposes, a brief investigatory detention is permissible if "supported by a reasonable and articulable suspicion of criminal activity." *Lucci*, 758 F.2d at 155-56; *See also Reid*, 448 U.S. at 440; *Clardy*, 819 F.2d at 672. The totality of the circumstances are considered in determining which suspicions are "reasonable and articulable." *United States v. Cortez*, 449 U.S. 411, 417 (1981).

In *Cortez*, the Supreme Court established a two-step inquiry to determine the legality of a seizure. *Id.* First, the law enforcement officials must demonstrate the existence of "some objective manifestation that the person stopped is, or is about to be engaged in criminal activity." *Id.* In this case, a showing that the defendant met several characteristics of the drug courier profile is relevant to determining the legality of the seizure.[9] Merely satisfying

[9]The "drug courier profile" is an abstract of characteristics found to be typical of persons transporting illegal drugs. *Florida v. Royer*, 460 U.S. 491, 493 n.2 (1983). The Drug Enforcement Administration has not committed the profile to writing. The drug courier profile has not received unanimous approval by either the

the drug courier profile, however, "does not, standing alone, justify a seizure." *United States v. Tolbert*, 692 F.2d 1041, 1047 (6th Cir. 1982), *cert. denied*, 464 U.S. 933 (1983). *See also Reid*, 448 U.S. at 441. Second, under the totality of the circumstances, these objective observations must raise an articulable suspicion that the "particular" individual stopped is engaged in criminal activity. *Cortez*, 449 U.S. at 417.

In the present case, the district court found that both inquiries of *Cortez* were satisfied as Taylor: (1) arrived on a plane from Miami, Florida -- a drug source city; (2) walked away from the gate nervously, hurriedly and moved faster than the other passengers; (3) constantly looked backwards as he walked; (4) carried a tote bag that he held tightly to his body; and (5) left the terminal walking very fast. The district court held the above factors provided the officers with a reasonable, articulable suspicion that Taylor was engaged in criminal activity at the time he was stopped. *See* Joint Appendix at 72. Order Denying Motion to Suppress Evidence, *United States v. Taylor*, 88-20270-H. We find that the objective facts do not satisfy the *Cortez* inquiry.

The officers' actions are not justified under *Cortez* because Taylor's actions are common among many who deplane in busy airports. First, travel to and from an alleged drug source city is inherently unsuspicious behavior. In *United States v. Andrews*, 600 F.2d 563 (6th Cir. 1979), we explained:

> [T]ravel from Los Angeles cannot be regarded as in any way suspicious. Los Angeles may indeed be a major narcotics distribution center, but the probability that any given airplane passenger from that city is a drug courier is infinitesimally small.

Supreme Court or this circuit, as the combination of factors looked for vary among agents. *See Saperstein*, 723 F.2d at 1228. Instead, courts are required to determine "whether in each particular case the combination of facts present and the manner in which they are exhibited justifies a stop." *Id.*

> Such a flimsy factor should not be allowed to justify -- or help justify -- the stopping of travelers from the nation's third largest city. Moreover, our experience with DEA agent testimony in other cases makes us wonder whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center.

Id. at 567.[10] Accordingly, arrival on a flight from Miami is objectively unsuspicious.

Second, the officers believed that Taylor met the characteristics of a drug courier by walking quickly and nervously through the terminal. It is well-known that police manuals instruct officers to become familiar with their beat and to identify people who do not "belong." *See, e.g.*, Johnson, *Race & the Decision to Detain a Suspect*, 93 Yale L.J. 214, 226 (1983). Sergeant Eldridge testified that Taylor appeared "different" from other deplaning passengers:

> Q: All right. Now go ahead now, how did the defendant appear on this occasion?
>
> A: He appeared [in] kind of a grunnchy (sic) type work clothes. He had a dirty black baseball cap with something wrote (sic) across the front of it, and little squirrley, kind of like captains wear, the little gold squirrels across the bill . . . .

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[10]The government maintains another significant, suspicious factor is that Taylor purchased his one-way ticket to Memphis in cash. Drug couriers benefit from cash transactions because of its anonymity. *See Saperstein*, 723 F.2d at 1228. Here, however, Taylor purchased the ticket *in his own name*. Certainly, purchasing a ticket under one's legal name is uncharacteristic behavior for a drug courier. This casts further doubt not only on the officers' basis for stopping Taylor, but also on the reliability of the drug courier profile.

> Q: In the military -- called scrambled eggs?
>
> A: There you go -- scrambled eggs. And he had on, I think it was, a blue shirt with "Pace" or something written across the pocket. A pair of blue trousers, white tennis shoes.
>
> Q: And why do you say he -- why did he stick out?
>
> A: *Well, the rest of the passengers that usually come from Miami flights is* (sic) *either business people or resort type people, people getting off in real casual nice looking clothes.* Like I say, it was just different seeing somebody getting off there looking like Mr.[Taylor] looked that night.

Joint Appendix at 87. Transcript at 11 (emphasis added). This observation is inherently subjective and, therefore, subject to great abuse because people are clad in a wide array of clothing whether or not they are coming from or going to a typical vacation spot. Using the flawed analysis employed by Sergeant Eldridge, *anyone*, including the only African-American to deplane, can not "belong" and fit the drug courier profile merely by their appearance.

Officer Bevel testified that primarily Taylor's nervous behavior caused her to believe that he had or was in the process of committing a crime. *See* Joint Appendix at 120. Transcript at 240. However, people constantly hurry through airports -- they are often looking for the party meeting them or rushing to board a connecting flight. Walking fast or even running is not uncommon in an airport. Many people do not check baggage to save time. All of these actions constitute perfectly lawful behavior. Yet, when the officers saw Taylor hurrying through the airport, looking around, and not stopping at the baggage area, they determined that he fit the drug courier profile. This determination was inappropriate because observing an individual walking quickly through

an airport or nervously looking around is insufficient to warrant a search and seizure.

The *Cortez* Court recognized that an officer "versed in the field of law enforcement", may arguably view these factors as suspicious. *Cortez*, 449 U.S. at 418. In this case, however, the officers -- particularly Sergeant Eldridge who led the pursuit -- had little training in identifying a drug courier. Sergeant Eldridge had been with the Memphis Police Department twenty-two years, yet, in October 1988, he had been with the airport drug task force only six months.

Based on the officers' limited experience and the circumstances they observed, we conclude that they reasonably could not have suspected, as a matter of law, that Taylor was engaged in criminal activity.[11] We find it particularly relevant that the *least* qualified officer, Sergeant Eldridge, led the pursuit. The evidence relied upon -- Taylor's arriving on a plane from Miami, Florida and walking quickly through the terminal, clutching luggage -- "describes a large category of presumably innocent travelers, who would be subject to virtually random seizures were [we] to conclude that as little foundation as there was in this case could justify a seizure." *Reid*, 448 U.S. at 441. Therefore, we believe the objectivity required in the first inquiry of *Cortez* was not achieved.

Thus, the officers also failed to meet the second inquiry of *Cortez* because the totality of the factors that they relied upon evidenced unsuspicious behavior. We have held "certain behavior characteristics [are] inherently *unsuspicious* [of criminal activity] and thus, entitled to no weight in the calculation." *Saperstein*, 723 F.2d at 1228 (emphasis added). *See, e.g. United States v. Andrews*, 600 F.2d 563, 566 (6th Cir.), *cert. denied sub nom. Brooks v. United States*, 444 U.S. 878 (1979)

[11]The officer simply followed Taylor because he was black, a constitutionally impermissible action. *See supra* section I.

(nervousness deemed consistent with behavior among innocent airport travelers and is entitled to no weight); *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977) (circumstances where DEA agent observed three persons, two of whom were nervous, return on nonstop flight from Los Angeles to Detroit after short trip with only one suitcase did not provide specific and articulable facts to warrant investigatory stop). The totality of the circumstances, in the present case, did not yield particularized suspicions that warranted a seizure based on a reasonable and articulable suspicion of criminal activity. Thus, we would find Taylor's seizure unconstitutional and believe that the evidence obtained as a result of that seizure should be suppressed.

III.

Taylor further contends that even if the initial seizure of his person was justified, he never gave the officers verbal or written consent to search his bag. The government argues that Taylor explicitly consented to the search of his bag. The district court found as a matter of fact that Taylor consented to the search. We conclude, however, that such a finding was clearly erroneous.

It is well-settled that without a search warrant and in the absence of probable cause and exigent circumstances, the validity of a search depends on the defendant's purported consent. *See Florida v. Royer*, 460 U.S. 491, 497 (1983). Furthermore, where the validity of the search rests on consent, the government has the "burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." *Id. See also Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979); *Schneckloth v. Bustamonte*, 412 U.S. 218, 233-34 (1973); *United States v. Williams*, 754 F.2d 672, 674-75 (6th Cir. 1985).

Whether Taylor's consent was voluntary or the product of coercion, express or implied, rests upon an analysis of

the totality of the circumstances. *See Schneckloth*, 412 U.S. at 227. We have held that consent "must be proved by clear and positive testimony and must be unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion." *Williams*, 754 F.2d at 675. *See also McCaleb*, 552 F.2d at 721.

There is sufficient evidence of coercion by the officers to negate any belief that Taylor voluntarily consented to the search of his bag. Sergeant Eldridge followed Taylor and pulled him back from the curb and onto the sidewalk. The officers surrounded Taylor so that he felt he could not leave without cooperating. These circumstances set the stage for the officers to elicit a positive response from Taylor to search his bag. Furthermore, the transcript of the evidentiary hearing shows that there was a clear contradiction between Taylor's and the officers' account as to what occurred. The record below, therefore, was not clear and unequivocal. Taylor testified that although he did not consent, he unzipped the bag, looked through it and told the officers he had nothing of interest to them. Officer Bevel stated Taylor did consent to the search. Taylor testified that Officer Bevel jerked the bag from him and violently searched it causing some of the contents to fall on the sidewalk.

Moreover, the officers never informed Taylor that he had the right not to consent to the search of his bag.[12]

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[12]At the evidentiary hearing, Sergeant Eldridge testified that it was not his responsibility to inform Taylor that he had the right not to consent:

> Q: Everything that you consented to – you gave him no chance to consent or not to consent, did you, because you didn't tell him that he had a right not to?
>
> A: Well, - - you are right, I didn't tell him that he had a right not to.
>
> * * *
>
> Q: Okay. You did want him to know that he had the right to consent?
>
> A: That's up to him. Whether he had knew (sic) he had the right to consent or not, *it is not up to me to advise him that*

Even though the Constitution does not require "'proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search,' [*Schneckloth*, 412 U.S. at] 234 (footnote omitted), such knowledge [or lack thereof is] highly relevant to the determination that there had been consent." *Mendenhall*, 446 U.S. at 558-59.[13] At no time during the stop did the officers inform Taylor that he did not have to cooperate and was free to withhold his consent. Considering the totality of the circumstances, we find that Taylor did not freely and voluntarily consent to the search of his bag.

Next, we must determine whether Taylor, when taken to the security office, consented to the continued search of the bag and the opening of one of the packages in which cocaine was found. Here again, we find that Taylor did not consent.

The fourth amendment limits the search and seizure powers "in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976). A search warrant issued by a neutral and detached magistrate protects individuals from capricious governmental interference. *See Johnson v. United States*, 333 U.S. 10, 13-14 (1948). Therefore, warrantless searches are *per se*

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he has the right. I can come up to any individual on the street and say I'm a police officer, but you don't have to talk to me but will you talk to me.

Q: And you certainly didn't tell him he had a right to refuse you all to go in his bag?

A: No, sir, I did not.

Joint Appendix at 108. Transcript at 96 (emphasis added).

[13]In *Mendenhall*, twice the officers expressly told the respondent that she was free to decline to consent to the search. The Court found that these explanations by the officers substantially lessened the probability that their conduct reasonably could have appeared coercive. *See Mendenhall*, 446 U.S. at 558-59.

unreasonable under the fourth amendment. They are upheld only in limited circumstances.[14]

From the testimony, it is evident that the officers asked Taylor to sign both a written statement and a consent to search form. Taylor refused both requests. Absent consent, exigent circumstances or one of the exceptions, a search warrant was needed for the officers to lawfully search Taylor's bag. *See Katz v. United States*, 389 U.S. 347, 356-59 (1967); 3 C. Wright, Federal Practice and Procedure: Criminal 2d § 666 (1982). The officers had sufficient time and ample opportunity to secure a search warrant; nevertheless a search warrant was never obtained. Because the bag was searched and the package opened without a search warrant, the search was impermissible. *See Katz*, 389 U.S. at 357. Since we believe that Taylor's consent, if any, was not voluntary, we would conclude that the search was not permissible. Therefore, the cocaine recovered from Taylor's bag should be suppressed as the product of an illegal search and seizure.

IV.

The mere fact that an African-American is observed walking quickly through an airport terminal does not raise the suspicion of criminal activity. Any attempt to detain such an individual, therefore, *must* be conducted within the parameters of the fourth amendment. In this instance, the fourth amendment's protections were ignored. The officers failed to establish that a reasonable, articulable suspicion existed to warrant Taylor's detention. Moreover, the facts do not indicate that Taylor consented

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[14]The exceptions to the warrant requirement include: automobile searches, *United States v. Ross*, 456 U.S. 798 (1982); consent searches, *Bumper v. North Carolina*, 391 U.S. 543 (1968); searches incident to a lawful arrest, *United States v. Robinson*, 414 U.S. 218 (1973); limited searches and seizures under the stop and frisk doctrine, *Terry v. Ohio*, 392 U.S. 1 (1968); searches and seizures in hot pursuit of a fleeing felon, *United States v. Santana*, 427 U.S. 38 (1976); and searches and seizures to prevent the loss or destruction of evidence, *Vale v. Louisiana*, 399 U.S. 30 (1970).

to the search. Therefore, we would order the suppression of evidence seized pursuant to this unconstitutional arrest, search and seizure. Although we recognize the importance of curtailing illicit drug use in our society, the "War on Drugs" can never license law enforcement officials to disregard the rights guaranteed by the fourth amendment or the principles embodied in the equal protection clause of the fourteenth amendment to our Constitution.

For the foregoing reasons, we would **REVERSE** the judgment of the district court and **REMAND** the case for further consideration consistent with this opinion.

BOYCE F. MARTIN, JR., Circuit Judge, dissenting. I join in Judge Keith's dissenting opinion and write separately to express my personal belief that the result reached in this case is constitutionally unsound. The majority sanctions unreasonable airport searches as a short-term solution to what has not yet proven to be the long-term problem of a country awash in easily obtainable drugs.

In its war on drugs, the majority has endorsed an airport stop-and-search policy based on hunch and whim rather than any reasonable level of suspicion. I could accept a rule that would, without exception, subject everyone and everything to a stop and a search upon entry to or exit from an airport. I could even accept a rule under which every tenth entrant was stopped. Either of these rules could be clearly articulated and administered in a manner such that everyone who travelled would be treated in the same fashion. Under either of these systems, anyone who travelled would be aware of the objective standard, whether the person was travelling for legal or illegal purposes. What I cannot accept is the purely subjective standard adopted by the majority, which in the present case permits a stop and a search based on race.

The crucial question in this case is the limitation on the power to control freedom of movement. I have never lived under an authoritarian government. I have always believed that freedom from fear of unwarranted governmental intrusion as well as the right to criticize without fear are the cornerstones of a free society. History bears witness to the fact that authoritarian regimes always arise from the executive branch of government rather than the legislative or judicial. Abuse of individual rights by the executive is controlled to a great extent by fear of exposure. With a degree of success, our society regulates the executive through detached, independent and fair-minded review by the judiciary. Here, the majority abdicates this responsibility in favor of expediency,

representing once again, the aggrandizement of community rights at the expense of individual freedoms.

When I travel, I am typically attired in a suit and tie and behave in a conventional manner. I doubt that I attract much attention from the airport police, even though I may exhibit signs of nervousness or agitation due to turbulence during a flight or a difficult connection. I face little, if any, possibility of being stopped. Perhaps it is my dress and manner; I believe that it is these factors combined with the fact that I am white. In stark comparison, Mr. Taylor's deplaning begins a long journey down the slippery slope to the past. The police officers testified that Mr. Taylor exhibited signs of nervousness and agitation. It is apparent that because of his race and his clothing in addition to his nervousness, Taylor was singled out as he deplaned.

In reviewing the transcript of the hearing before the district court, I can see no evidence of personal animosity on the part of the airport officers. In fact, the evidence seems to reveal officers attempting to carry out their duty. What they did testify to and what I object most strenuously to is the poor training, the poor guidance, and the absolute inability on the part of the officers to articulate a reason for the stop and search of Mr. Taylor, other than the relative appearance of his clothing, the fact that he was travelling from Miami to Memphis, and the fact that Mr. Taylor is a black American. This is simply impermissible, even under the weakened and eroded state of the Fourth Amendment.

Good investigation pays off in fair and prompt convictions. Once again, however, our en banc court fails to recognize that we are sliding backwards. *See United States v. Steele*, 933 F.2d 1313, 1328 (6th Cir. 1991) (en banc). Under the majority's indefinite standard, it is difficult to discern a scenario where we could find unreasonable, a stop and a search of any non-white person leaving a plane from Miami. Under the majority's standard, would the stop and search be

unreasonable if the non-white person was well-dressed and carrying luggage, but appeared nervous and agitated? Would the stop and search be unreasonable if that non-white person was shabbily dressed and carrying luggage, but appeared less nervous than Taylor? What if the non-white person was well-dressed and appeared less nervous than Taylor, but was carrying no luggage? The absurdity of these questions reveals the frightening potential for abuse of the majority's standard. When race is combined with dress characteristics as the means of determining who is to be searched, I believe this squarely violates the Fourth Amendment. Some might argue that Taylor's subsequent conviction weakens my argument, but Taylor's ultimate guilt is not the issue. Guilt is *never* the issue in Fourth Amendment analysis. I believe that the majority's unarticulated, indefinite standard opens the door to abuse. In turn, I believe the growth of this abuse will result in the repetition of our not-too-distant history when only *some* members of our society were able to travel without fear of unwarranted governmental intrusion.

NATHANIEL R. JONES, Circuit Judge, dissenting. The compelling dissenting opinion of Judge Keith draws my unqualified concurrence. I also join the excellently reasoned dissent of Judge Martin. Their analyses prompt me to add a word for the purpose of highlighting two serious ironies posed by the majority. In noting these ironies, I have no intention of seeking to add to the scholarship so evident in the masterful opinions of Judges Keith and Martin, for I could not.

This Court must be reminded that its *en banc* opinion in this case comes forth when our nation is concluding its observance of the bicentennial of the Bill of Rights. The case clearly invokes the Bill of Rights and its promises to individual citizens. The majority issues its opinion from a building majestically draped with huge banners proclaiming the bicentennials of both the Bill of Rights and the Constitution. Yet, ironically, the majority reaches a conclusion in its opinion that is unworthy of those heralded documents.

There was absolutely no articulable basis, except that of race, for the law enforcement agents' decision to "fix" on the appellant as he deplaned at the Memphis Airport. He was one of a "steady stream of passengers." *See supra*, p. 2. The claim that Taylor was stopped because he was dressed differently is not at all persuasive, especially considering the assortment of attire that individuals today don for travel, nor is the charge that he was traveling with only one bag. A college student, for example, visiting home or another campus for a weekend, in all likelihood will not be dressed in business attire or resort-wear and, moreover, might well be carrying only an overnight bag. Other judges, courts, and commentators have remarked with amazement, disapproval, and despair that the characteristics of the "drug courier profile" are so fluid as to be contradictory, and so general as to encompass a realm of perfectly innocent behavior. *See, e.g., United States v. Hooper*, 935 F.2d 484 (2d Cir. 1991) (Pratt, J., dissenting) ("The 'drug courier profile' . . . is so fluid that it can be used to justify designating anyone a potential

drug courier if the DEA agents so choose."), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Oct. 15, 1991); *United States v. Andrews*, 600 F.2d 563, 566-67 (6th Cir. 1983) ("[O]ur experience with DEA agent testimony . . . makes us wonder whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center."), *cert. denied*, 444 U.S. 878 (1979); *United States v. Pulvano*, 629 F.2d 1151, 1155 n.1 (5th Cir. 1980) (recognizing that every major population center has become home for drug trafficking); *United States v. Westerbann-Martinez*, 435 F. Supp. 690, 698 (E.D.N.Y. 1977) (noting that the drug courier profile "seems to change itself to fit the facts of each case."); *Fluid Drug Courier Profiles See Everyone as Suspicious*, 5 Crim. Prac. Man. (BNA) No. 14, at 333-36 (July 10,1991) (citing a full page of contradictory characteristics held to fit the drug courier profile in cases across the country).

The principal, though unarticulated, reason for Taylor's being singled out for questioning was his race. It is beyond dispute that race is a constitutionally impermissible basis upon which a law enforcement officer may decide to stop and search a person. Despite this established principle, the majority nevertheless validates the stop and seizure in this case. I can only assume that Judge Martin is correct in concluding that the majority's unarticulated reason for taking such a step is furtherance of the war on drugs. While I sympathize with those whose job it is to fight this unfortunate war, I do not believe that it is the function of a court to facilitate the war in violation of the United States Constitution. On the contrary, courts exist to ensure that the Constitution is upheld, even in the face of national crises. The majority, however, in order to reach its result in this case, has signed on to a law-enforcement strategy that adroitly and skillfully circumvents the document which has been the foundation of our nation for two hundred years.

One would have hoped that at this stage in the United States' development the lessons of our past would be learned: that in times of crisis, courts must be unyielding to the passions of the moment. That truism certainly springs, inter alia, from our World War II experience with the *Korematsu* case. The country is in the midst of another war, albeit of a different type, and we would do well to remember the words of Justice Murphy's dissent in *Korematsu*. He cautioned that while the "scope of . . . discretion [of those waging the war] must, as a matter of necessity and common sense, be wide," likewise "[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting). Justice Murphy's wisdom is demonstrated in that he actually predicted that the *Korematsu* decision might someday lead to a result such as the one the majority has reached in this case. *Id.* at 240 (Murphy, J., dissenting) (warning that the Court's holding in *Korematsu* would "encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow").

The final irony I wish to note is that the protections of the Bill of Rights are being weakened at the very time that South Africa and the countries of Eastern Europe are seeking to import them into their own body of laws. American jurists and lawyers are traversing the oceans to lend their expertise to the emerging democratic governments and freedom movements to this end. I can only hope that our example will continue to teach these nations that civil rights must be protected both in word and in deed.

Some may conclude that I am magnifying the significance of the majority holding. I do not think so. This Court has today joined in a tragic retreat from those principles that have made this nation stand as a beacon of hope to the oppressed throughout the world. It is a retreat

in which I, and my dissenting colleagues, cannot, in silence, participate.

I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Filed: June 30, 1989

UNITED STATES OF AMERICA

Plaintiff,

vs. CASE NO. 88-20270 H

EDDIE LOUIS TAYLOR

Defendant.

ORDER DENYING MOTION TO SUPPRESS EVIDENCE

Eddie Louis Taylor was arrested by Drug Task Force police officers at Memphis International Airport on October 3, 1988, on charges of illegally possessing two (2) kilograms of cocaine. He was indicted by a federal grand jury on October 11, 1988, charged with illegally possessing with intent to distribute the cocaine. Mr. Taylor pled not guilty during his

arraignment before a Magistrate on October 26, 1988.

On November 9, 1988, Mr. Taylor moved the Court for an order suppressing the use by the government of the cocaine as trial evidence. He claims the seizure of the cocaine from his tote bag by airport police on October 3, 1988, violated rights secured to him by the Fourth Amendment to the Constitution of the United States. The United States denies the seizure violated the Fourth Amendment. The Court conducted an extensive evidentiary hearing to resolve the issue. The Court finds, upon the entire record, the motion to suppress should be denied.

Testimony

Sergeant Joe Eldridge, an officer with the Memphis Police Department for 21 years, testified that on October 3, 1988,

he had been assigned to the Drug Task Force Unit at Memphis International Airport for approximately six (6) months. His assigned duties related to drug interdiction at the airport.

On October 3, 1988, he, along with two other officers, Roberts and Bevel, were at gate B-19 waiting the arrival of a flight from Miami, Florida. He said they had no forewarning. They were just present looking for anyone deplaning that flight who might be carrying drugs. He said his observations centered on anyone looking suspicious, walking too fast or too slow, overdressed or underdressed, or traveling on a one way ticket.

He testified he observed Mr. Taylor, the defendant, walk off the plane quickly, look around the gate area, and look over his shoulder several times while he was

walking very fast. He said Mr. Taylor was wearing work clothing and a dirty baseball cap with gold braid on the bill. He was wearing a blue shirt, blue trousers and white tennis. Sergeant Eldridge said Mr. Taylor was just different from the other passengers. He was carrying a new looking tote bag over his shoulder and holding it tight against his body. He said he and the other two officers followed Mr. Taylor out of the airport. Instead of stopping at the baggage carousel, Mr. Taylor, once outside, turned west walking very fast while looking back over his shoulder several times. He testified the speed Mr. Taylor was walking while looking back over his shoulder several times attracted their attention and caused the officers to become suspicious of him.

The three officers approached Mr. Taylor on the sidewalk outside the terminal. He said he identified himself to Mr. Taylor as a police officer and asked if he could talk with him. He was not dressed in uniform. He showed Mr. Taylor his badge and identification. He did not touch Mr. Taylor. He said Mr. Taylor agreed to talk with him. Sergeant Eldridge said he asked Mr. Taylor to show him his ticket, which he did. It was a one way cash purchased ticket. He returned the ticket to Mr. Taylor and asked him for identification. Mr. Taylor showed him a Missouri driver's license. There was no discrepancy in the names on the ticket or driver's license.

At about this time, Officer Bevel asked Mr. Taylor if they could look in his bag. Mr. Taylor said he would not mind

them looking in the bag. Mr. Taylor sat the bag on the ground or sidewalk, unzipped it, shuffled some papers aside and then said something to the effect of see, there's nothing here. Mr. Taylor was then asked if Officer Bevel could look in the bag and he said yes. Under the paper, in the bag, Officer Bevel saw two brown wrapped packages. Thereupon, Mr. Taylor was requested to accompany the officers to the Drug Task Force Office which he agreed to do. Sergeant Eldridge said Mr. Taylor was free to leave the officers up to the time of the discovery of what appeared to be drugs in his bag. He said Mr. Taylor was sweating profusely. Officer Roberts read Mr. Taylor his Miranda rights. Thereafter he was asked if the officers could open the two packages. Mr. Taylor agreed. The packages, contained a white

powder substance which field tested positive as cocaine. Thereupon, Mr. Taylor was advised he was under arrest and he was searched. He had, among things, $1,000.00 in each sock, more than $900.00 in his pocket and some money in his wallet.

During cross-examination, Sergeant Eldridge said Mr. Taylor told Officer Bevel he had been in Miami, Florida three weeks looking for a job. When asked why he had only one bag, Mr. Taylor just listened. He told them he was going to Missouri and was en route to the bus station. He told them the only items in his bag were presents for his children.

Sergeant Eldridge said he was assigned to the Drug Task Force in April, 1987. He had completed two weeks of training at the DEA school in Dalton, Georgia. He had on the job training at the

airport by other officers. He had no formal training on what has become known as the drug courier profile. Nor had he read anything on that subject.

He said it is an approach situation and everything is by consent. They look for people who are acting nervous, over or under dressed, walking too fast or too slow or smoking a cigarette too fast. He said he is at the airport six days per week, eight to twelve hours each day. He said they simply approached and interviewed Mr. Taylor. He said Mr. Taylor was looking back while he was walking fast, almost doing a light jog. He said the three officers followed Mr. Taylor three to five minutes before he stopped. When Mr. Taylor stopped, they approached him. Sergeant Eldridge said he held his badge and identification out in front on

himself about two and one half feet from Mr. Taylor's face. He did not touch Mr. Taylor's face. He did not touch Mr. Taylor. He said, I think I said to Mr. Taylor can I speak to you a minute. Mr. Taylor responded sure. He asked if he could see his airline ticket. Mr. Taylor handed it to him. He asked for identification. Mr. Taylor handed the officer a Missouri's drivers license. The name was the same on both the airline ticket and the license. Sergeant Eldridge said Officer Bevel asked Mr. Taylor about his travel after identifying herself as a drug enforcement officer. He said Mr. Taylor said he had been in Miami, Florida, about three weeks looking for a job. She asked him where he was going from the Memphis Airport and how was he going to get there. He stated he was going to

Missouri by bus from Memphis. At some point, Sergeant Eldridge asked Mr. Taylor if he would permit officer Bevel to search the bag and he agreed. He was advised of his Miranda rights by officer Roberts in the drug task force office in the airport. He was not asked to sign a waiver of rights form.

Sergeant Eldridge said Mr. Taylor was cooperative. He never disagreed with anything. There was no problem whatever. He said events leading to Mr. Taylor's arrest were not planned. It all just happened.

Bonnie Bevel, an Airport Police Officer for 13 years, has been assigned to the Drug Task Force since July of 1987. She said her job is to look for drugs and evidence of drug trafficking in the airport. She was on duty October 3, 1988,

and assisted in the arrest of Mr. Taylor. She said that she, along with Sergeant Eldridge and Sergeant Roberts, were situated in B Concourse at gate B-19 waiting for the arrival of a flight from Miami, Florida. They were seated together.

She said Mr. Taylor came off the plane into the airport, glanced around the gate area and abruptly left the area walking very fast. He was carrying one tote bag, clutching it under one of his arms. The officers all left the gate area at the same time. She said they had no prior warning about Mr. Taylor. He was looking around. He was looking back over his shoulder. He was in quite a hurry to get out of the airport gate area, He was walking faster than anyone else getting off the plane. He went straight down the steps. He came from Miami, Florida, a

source city. He had one tote bag. When Mr. Taylor stopped, he was approached by Sergeant Eldridge who showed him identification. She said it appeared to her Mr. Taylor was looking back to see if there was any kind of surveillance. While Sergeant Eldridge was looking at Mr. Taylor's ticket and drivers license, she asked Mr. Taylor how long he had been in Miami and how it was that he had only one tote bag. She said he consented to them looking in his bag. Mr. Taylor told them that he only had gifts for his children in the bag. Officer Bevel said, based upon her experience as a police officer, the cocaine she has seen at the airport has been wrapped in brown plastic with gray plastic tape. In their office, Sergeant Roberts asked Mr. Taylor if he could take a small amount of the substance for

testing. He agreed. It tested positive as cocaine. Thereupon, Mr. Taylor was formally placed under arrest.

Officer Forrest B. Roberts testified he had been assigned to the airport Drug Task Force for more than one year. On October 3, 1988, he was on duty with officers Eldridge and Bevel at gate B-19, Memphis International Airport. They were observing passengers deplaning from an inbound flight from Miami, Florida. They were looking for anyone who might be trafficking in drugs. They were not looking for any particular person, just abnormal or unusual behavior. He said Mr. Taylor attracted their attention because he was wearing work clothing. He was somewhat dirty in appearance. He was dressed differently from other passengers. When Mr. Taylor came off the flight, he

said the three officers all turned and looked at each other. He said Mr. Taylor looked around the gate area. He walked fast. He appeared to be nervous. He had a carry-on tote bag which was being carried very tight to his side. He appeared to be protecting the bag. He moved faster than others in the airport. He went down the escalator, out the center doors and turned left. He walked ten to fifteen feet and stopped. He was across one street when Officers Eldridge and Bevel approached Mr. Taylor. He only heard Sergeant Eldridge say to Mr. Taylor, "excuse me." He read Mr. Taylor his Miranda rights and field tested the powder and determined it was cocaine.

Eddie L. Taylor testified he lives in Caruthersville, Missouri. He arrived at the Memphis Airport about 7:00 p.m. on a

flight from Miami, Florida, He was stopped by officers outside the airport. He said he walked from the B-19 gate area at a normal pace and did not see the officers. He said he walked like he was trying to beat the crowd out of the airport to get his car which was parked on a parking lot. He did not know he was being followed. He had a small tote bag with a long shoulder strap. He said he was not clutching it tightly. Outside the airport, someone said excuse me sir, then said it a second time. Then he said the person, Officer Eldridge, pulled him by the arm, stepped around him and said,

> I'm Officer Eldridge, I'm with the Drug Task Force. We are trying to stop drug trafficking through the airport.

Thereupon, Mr. Taylor said he asked what does that have to do with me. He, upon request, handed his ticket and drivers

license to Officer Eldridge. Mr. Taylor testified Officer Bevel arrived about three or four minutes later. When Eldridge asked him what was in the bag, he did not get to say anything. Officer Bevel grabbed the bag by its strap. When the officers asked him for permission to look in the bag, he said to them there's nothing in there you are looking for.

He said he opened the bag, moved papers around. He denied giving them permission to search the bag. He said after the officers looked in the bag, he did not voluntarily go with them to the Drug Task Force Office. He said he was not nervous. He was not looking around for airport police, Mr. Taylor testified he did not know cocaine was in his tote bag. He thought the bag contained gifts for his children.

Findings of Facts/Conclusions of Law

The Court is of the opinion and finds the officers had a reasonable suspicion supported by articulable facts that Mr. Taylor may have been trafficking in drugs. He was a passenger on a plane arriving in Memphis, Tennessee, from a source of drugs city - Miami, Florida. When he deplaned, Mr. Taylor walked away from the gate area hurriedly, moving faster than other passengers. Mr. Taylor was carrying a tote bag that he held tight to his body. He constantly looked backwards as he walked. He did not stop for luggage but, instead, left the terminal building walking very fast. He was going to a parking lot where he had an automobile. He was en-route to Missouri.

The evidence shows Mr. Taylor consented to interview by the officers.

The evidence shows he consented to the search of his tote bag. He, in fact, was in possession of two (2) kilograms of cocaine. Mr. Taylor was actually arrested when the cocaine was discovered in the tote bag. At that point, he was not free to leave the presence of the officers.

The Court therefore concludes Mr. Taylor's arrest by Drug Task Force officers at the Memphis International Airport was a legal arrest. United States v. Sokolow, ___ U.S. ___, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

Accordingly, the motion to suppress is denied.

It is so ordered this 30th day of June, 1989.

s/ Odell Horton
Odell Horton, Judge
United States District Court

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

No. 89-6396

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
EDDIE LOUIS TAYLOR,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed October 25, 1990

Before: MERRITT, Chief Judge; and KEITH and JONES, Circuit Judges.

KEITH, Circuit Judge, delivered the opinion of the court, in which JONES, Circuit Judge, joined. MERRITT, Chief Judge, (p. 21) delivered a separate concurring opinion.

KEITH, Circuit Judge. Defendant Eddie Louis Taylor ("Taylor") was arrested on October 3, 1988 for possession with intent to distribute two kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1). Taylor moved to suppress the admission of the cocaine found in his luggage, arguing that he and the luggage had been seized in violation of the fourth amendment. After the district court denied the motion, Taylor entered a conditional guilty plea pursuant to Federal Rule

of Criminal Procedure 11(a)(2). Finding that Taylor was seized in violation of the fourth amendment, we **REVERSE.**

I.

On October 3, 1988, at approximately 7:00 p.m., three plainclothed officers of the Memphis Police Department: Sergeant Joe Eldridge ("Sergeant Eldridge"); Officer Bonnie Bevel ("Officer Bevel") and Officer Forest Britt Roberts ("Officer Roberts") (collectively "the officers")[1] were stationed at the Memphis International Airport when they observed Taylor deplane a flight arriving from Miami, Florida. Sergeant Eldridge stated that Taylor, a middle-aged black man, appeared much different from the other deplaning passengers. The other passengers were dressed in business or vacation attire, while Taylor was clad in dark slacks, a work shirt and hat. Sergeant Eldridge stated that Taylor also carried what appeared to be a new designer travel bag. Sergeant Eldridge believed Taylor was probably the only black person on the flight.

Taylor did not stop at the luggage carousel. Sergeant Eldridge stated that Taylor, appearing nervous and constantly looking over his shoulder, walked rapidly through the terminal, exited, and proceeded toward the parking lot. The officers did not discuss whether they should follow Taylor. The officers had neither a "tip" from a confidential informant that Taylor was transporting a controlled substance nor had a police dog sniffed Taylor or his luggage and detected drugs. Without any forewarning that drugs or a drug courier would be on the flight, the officers decided to follow Taylor. Sergeant Eldridge, who had little training in identifying drug couriers and had been on the drug task force only six months, led the officers in the pursuit.

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[1]The officers were members of the drug interdiction task force and assigned to stem the importation of illegal drugs into Tennessee.

At this point, the account of what occurred varies. The district court, however, credited the officers' testimony. Taylor testified that as he exited the terminal, Sergeant Eldridge grabbed his arm, forced him back from the curb, shoved a police badge in his face and ordered him to stop. Taylor saw the handle of Sergeant Eldridge's gun on his right hip. Sergeant Eldridge testified that upon exiting the terminal, he approached Taylor, identified himself, and ordered Taylor to stop because he wanted to talk to him. Sergeant Eldridge and Officer Bevel flanked Taylor while Officer Roberts assumed a position across the street between Taylor and the parking lot. The officers never informed Taylor that he did not have to speak to them or consent to a search of his personal effects. Officer Bevel identified herself and asked Taylor several questions: where was he going; where was he coming from; what did the bag contain; did he know anybody in Memphis; was he meeting anyone in Memphis; where was he going in Memphis; and did he have a contact person in Memphis.[2] Sergeant Eldridge asked Taylor to produce his airline ticket and some form of identification. Uncharacteristic of drug couriers, the name on the ticket matched the name on Taylor's Missouri driver's license.[3] Due to the physical positions of the officers and their aggressive questioning, Taylor felt he was not able to leave. In fact, he was *not* free to leave. Sergeant Eldridge testified that if Taylor had attempted to leave at any point, he would have pursued him.

Officer Bevel asked Taylor if she could look inside the bag he was carrying. Taylor did not verbally consent, but unzip-

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[2]*See* Joint Appendix at 119-24, 136, 138-39. Transcript from Evidentiary Hearing ("Transcript") at 239-44, 355, 358-59, *United States v. Taylor*, 88-20270-01-H.

[3]Taylor's airline ticket and driver's license were not returned to him immediately. Only after Taylor actually went to the police station and requested the license — more than one week after it had been taken — was it returned. Joint Appendix at 134. Transcript at 353.

ped the bag, shuffled papers around in it and said "There's nothing that you are looking for here." Joint Appendix at 142. Transcript from Evidentiary Hearing ("Transcript") at 363, *United States v. Taylor*, 88-20270-01-H. The officers did not observe anything suspicious in the bag. Taylor testified that Officer Bevel then snatched the bag from his hands, placed the bag on the sidewalk and began searching it. In searching the bag, Officer Bevel discovered two packages wrapped in brown plastic tape. She recognized this as wrapping typically used for cocaine. At that point, the officers persisted in questioning Taylor, handcuffed him, told him he was under arrest and led him to the airport security office for further investigation.

Once in the security office, Officer Roberts advised Taylor of his *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436 (1966). The officers tried to convince Taylor to sign a written statement and consent to search form, but Taylor refused. Although Taylor never signed a consent form and the officers never produced a search warrant; they, nevertheless, removed the packages from the bag and made a small cut in one of the packages. Officer Roberts stated Taylor consented to opening the packages. The substance in the packages field-tested positive as cocaine. The officers searched Taylor and found $1000 in cash hidden in his socks and additional money in his pockets and wallet. Taylor's car, which was parked at the airport, was subsequently seized.

On October 11, 1988, Taylor was charged in a one-count indictment for possession with intent to distribute two kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1). At his arraignment on October 26, 1988, Taylor pled not guilty. On November 9, 1988, Taylor filed a motion to suppress evidence. In his motion, Taylor argued that the initial encounter amounted to an illegal detention and that he did not consent to the search of his bag. Evidentiary hearings were held on February 10, 14 and 28, 1989. On June 30, 1989, the district court issued its order denying Taylor's motion to suppress.

The district court concluded, as a finding of fact, that Taylor consented to both the officers' interview and to the search of his bag. On July 28, 1989, Taylor entered a conditional guilty plea to the charge while reserving his right to appeal the denial of the motion to suppress. *See* Fed. R. Crim. P. 11(a)(2). On October 26, 1989, the district court sentenced Taylor to 63 months of imprisonment, three years of supervised release, and a $3000 fine. A timely notice of appeal was filed on October 30, 1989. Taylor remains on bond pending the outcome of this appeal.

II.

A.

Taylor contends that the district court erred in finding that he was not seized in violation of the fourth amendment. Taylor maintains that his fourth amendment rights were violated when the officers seized him on the sidewalk outside of the Memphis International Airport terminal. We agree.

The fourth amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV. These rights apply equally to criminal defendants as they do to every American citizen. The fourth amendment requires that searches and seizures be founded on objective justifications that encompass all seizures of the person "including seizures that involve only a brief detention short of traditional arrest." *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). Although there are some circumstances wherein a person may be detained briefly, without probable cause,[4] "any curtailment of a per-

[4]*See United States v. Sokolow*, ___ U.S. ___, 109 S. Ct. 1581, 1585 (1989) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

son's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid*, 448 U.S. at 440. *See Brown v. Texas*, 443 U.S. 47, 51 (1979); *Delaware v. Prouse*, 440 U.S. 648, 661 (1979); *Brignoni-Ponce*, 422 U.S. at 878; *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968).

We recognize that our government is in the midst of waging a "War on Drugs." Yet, the valiant effort of our law enforcement officers to rid society of the drug scourge cannot be done in total disregard of an individual's constitutional rights. In *United States of America v. Radka*, 904 F.2d 357 (6th Cir. 1990) we addressed this problem:

> Presently, our nation is plagued with the destructive effects of the illegal importation and distribution of drugs. At this critical time, our Constitution remains a lodestar for the protections that shall endure the most pernicious affronts to our society. . . . This drug crisis does *not* license the aggrandizement of governmental power in lieu of civil liberties. Despite the devastation wrought by drug trafficking in communities nationwide, we *cannot* suspend the precious rights guaranteed by the Constitution in an effort to fight the 'War on Drugs.'

Id. at 361 (emphasis added). Law enforcement officers cannot ignore the protections guaranteed by our Constitution — law enforcement officers cannot subject individuals to random invasions of their privacy.

Each case raising a fourth amendment issue "must be judged on its own facts." *United States v. Saperstein*, 723 F.2d 1221, 1227 (6th Cir. 1983) (quoting *United States v. Mendenhall*, 446 U.S. 544, 565 n.6 (1980)). Here, the initial issue to be resolved is whether Taylor was seized and, if so, when. The test for determining whether a seizure has occurred is "whether, under the totality of the circumstances, a reasonable person would have believed he or she was not

free to walk away." *Saperstein*, 723 F.2d at 1225 (citations omitted). *See Mendenhall*, 446 U.S. at 554; *United States v. Clardy*, 819 F.2d 670, 672 (6th Cir. 1987); *United States v. Lucci*, 758 F.2d 153, 155 (6th Cir.), *cert. denied*, 474 U.S. 843 (1985). Circumstances that might indicate a seizure, "even where the person did not attempt to leave, would be *the threatening presence of several officers*, the display of a weapon by an officer, some *physical touching of the person* of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request *might be compelled*." *Mendenhall*, 446 U.S. at 554 (emphasis added). *See Terry*, 392 U.S. at 19 n.16.

The government argues that *United States v. Collis*, 766 F.2d 219 (6th Cir.), *cert. denied*, 474 U.S. 851 (1985) is the controlling precedent.[5] We disagree. In *Collis*, we held that a seizure had not occurred when an officer: observed the defendant arrive from Miami; tapped the defendant on the

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[5]In *Collis*, three Drug Enforcement Administration agents ("DEA agents") were conducting surveillance at the Detroit Metropolitan Airport, when they observed Collis deplane a flight originating from Miami, Florida. Collis was one of the first passengers to deplane. He walked quickly through the airport concourse to the baggage claim area. As he approached the baggage claim area, Collis nodded to an unidentified man. One of the DEA agents stopped Collis outside of the airport terminal, lightly tapped Collis on the shoulder, identified himself as an agent and asked Collis for permission to question him. Collis consented to the questioning and agreed to accompany the DEA agents back to the baggage claim area. As Collis and the DEA agents were at the baggage claim area, the unidentified man: approached Collis; introduced himself as Collis' friend; and removed Collis' shoulder bag. One of the DEA agents immediately retrieved the bag and returned it to Collis. After anxiously pacing back and forth, Collis bolted through the terminal doors and ran into the parking lot with the DEA agents in pursuit. The parking lot was enclosed by a fence that blocked Collis' escape. Before the DEA agents could reach the fence, Collis heaved the shoulder bag over the fence and onto a concrete ramp. Thereafter, Collis was placed under arrest. The bag was recovered, searched and found to contain cocaine. *See Collis*, 766 F.2d at 220-21.

shoulder; identified himself as a DEA agent; and the defendant willingly and voluntarily cooperated with the agent. *Id.* at 221. *Collis* bears absolutely no similarity to the present case. Here, Taylor was not tapped simply on the shoulder, but was grabbed forcefully by the arm. Taylor did not put up any resistance to cooperating with the officers. Taylor did not flee or try to escape. The officers surrounded Taylor, and he answered the officers' questions because he felt compelled to do so. In *Collis*, we stated:

> *Absent coercive* or *intimidating behavior* which *negates* the reasonable belief that compliance is not compelled, [the agent's] questions for additional identification and voluntarily given information from the defendant does not constitute a seizure under the Fourth Amendment.

Id. (emphasis added). That the officers used coercive and intimidating behavior in this instance renders *Collis* inapposite. Furthermore, Sergeant Eldridge testified that Taylor was not free to leave. Taylor's detention constituted a seizure under the fourth amendment.

The facts of this case, indicate that the officers seized Taylor as he stood outside the airport and prepared to cross the street. Taylor testified that upon exiting the airport terminal, Officer Eldridge grabbed his arm and forced him back from the curb to talk to him:

> Q: Okay. Now, when was the first time that you knew that a police officer was following you?
>
> A: Well, I didn't really know that a police officer was following me at all. What I done, (sic) when I got ready to step off the sidewalk, as I got ready to step off the sidewalk, someone said, excuse me, sir. I didn't even bother to look back. And then they (sic) said, excuse me, sir, again. And as he said, excuse me, sir, the second time, he's pulling my arm, he's

> got me by the arm pulling me back. I am referring to Sergeant Eldridge. . . .
>
> Q: And the first time — what were you, how were you physically standing in relationship to the curb or the sidewalk when this officer seized your elbow?
>
> A: I was standing right at the edge of it. My toes were almost on the edge, almost where they would hang off. I was standing there. And when this one car passed by, I started to step down. When I started to step down, that is when he pulled me completely back up on the sidewalk. . . .

Joint Appendix at 131-33. Transcript at 348-50. Taylor also testified that the officers surrounded him. Because he could not pass them he felt that he was not free to leave.[6] Furthermore, on two separate occasions during the evidentiary hearing, Sergeant Eldridge testified that if Taylor attempted to leave at any point during the questioning — *before* the cocaine was found — he would have given pursuit.[7] The fact

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[6]At the evidentiary hearing, Taylor testified that he felt he was not free to leave:

> Q: Were they [the officers] on either side of you or both on the same side of you or which way were they?
>
> A: They were in front of me at an angle . . . they had enough space . . . to where *I couldn't go between them.*

Joint Appendix at 137. Transcript at 357 (emphasis added).

[7]On cross-examination, Sergeant Eldridge testified:

> Q: Okay. You would have just given pursuit but you wouldn't have tackled?
>
> A: Oh yeah, I would have kept after him.
>
> * * *
>
> Q: [I]f he tried to move, if he tried to run . . . you were going to give pursuit?
>
> A: No sir, I said I would probably give pursuit. . . .

that Sergeant Eldridge intended to detain Taylor and prevent him from leaving may be sufficient to support a finding that a seizure occurred. Other circumstances were present, however, which indicate that Taylor was not free to leave.

The facts of this case, lead us to conclude that Taylor was seized in violation of the fourth amendment. Sergeant Eldridge grabbed Taylor from the curb and pulled him back to the sidewalk. The officers, albeit plainclothed, positioned themselves so that Taylor could not pass. Sergeant Eldridge testified that if Taylor attempted to leave, he would have given pursuit. Both Sergeant Eldridge and Officer Bevel asked Taylor a barrage of questions that he felt *compelled* to answer, particularly since he felt he could not leave. Under the totality of the circumstances, a reasonable person at this point would not have felt free to walk away: therefore, Taylor was seized when he was stopped on the sidewalk outside of the terminal.

B.

Since we have established that Taylor was seized, our next inquiry is whether the seizure was constitutionally permissi-

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Q: Why would you give pursuit if you weren't going to stop, so you could run along and get your exercise?

A: No, sir, I would follow him to where he was going.

Q: Follow him to where he was going?

A: Yes, sir . . . If he took off, I would try to get some kind of communcation and have somebody pull in behind him for some more surveillance.

Q: You would try to get him stopped?

A: *Definitely. Somebody at this point, they are definitely involved in something if they take off running.*

Q: They are definitely involved in something.

A: Yeah.

Joint Appendix at 109-111. Transcript at 98, 105 (emphasis added).

ble. For fourth amendment purposes, a brief investigatory detention is permissible if "supported by a reasonable and articulable suspicion of criminal activity." *Lucci*, 758 F.2d at 155-56; *See Reid*, 448 U.S. at 440; *Clardy*, 819 F.2d at 672. The totality of the circumstances are considered in determining which suspicions are "reasonable and articulable." *United States v. Cortez*, 449 U.S. 411, 417 (1981).

In *Cortez*, the Supreme Court established a two-prong test to determine the legality of a seizure. *Id.* First, the law enforcement officials must demonstrate the existence of "objective observations." *Id.* This requirement is satisfied by evidence of a common pattern of criminal activity. In this case, a showing that the defendant met several characteristics of the drug courier profile is relevant to determining the legality of the seizure.[8] Merely satisfying the drug courier profile, however, "does not, standing alone, justify a seizure." *United States v. Tolbert*, 692 F.2d 1041, 1047 (6th Cir. 1982), *cert. denied*, 464 U.S. 933 (1983). *See Reid*, 448 U.S. at 441. Second, under the totality of the circumstances, these "objective observations" must raise an articulable suspicion that the "particular" individual stopped is engaged in criminal activity. *Cortez*, 449 U.S. at 417.

In the present case, the district court found that both prongs of the *Cortez* test were satisfied as Taylor: (1) arrived on a plane from Miami, Florida — a drug source city; (2)

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[8]The "drug courier profile" is an abstract of characteristics found to be typical of persons transporting illegal drugs. *Florida v. Royer*, 460 U.S. 491, 493 n.2 (1983). The Drug Enforcement Administration has not committed the profile to writing. The drug courier profile has not received unanimous approval by either the Supreme Court or this circuit, as the combination of factors looked for varies among agents. *See Saperstein*, 723 F.2d at 1228. Instead, courts are required to determine "whether in each particular case the combination of facts present and the manner in which they are exhibited justif[y] a stop." *Id.*

walked away from the gate nervously, hurriedly and moved faster than the other passengers; (3) constantly looked backwards as he walked; (4) carried a tote bag that he held tightly to his body; and (5) left the terminal walking very fast. The district court held the above factors provided the officers with a reasonable, articulable suspicion that Taylor was engaged in criminal activity at the time he was stopped. *See* Joint Appendix at 72. Order Denying Motion to Suppress Evidence, *United States v. Taylor*, 88-20270-H. We find that the *Cortez* test has not been met.

The officers failed to meet the first prong of the *Cortez* test because Taylor did not meet the drug courier profile. The officers believed that Taylor met the characteristics of a drug courier by arriving on a flight from Miami, Florida and walking quickly and nervously through the terminal. An officer "versed in the field of law enforcement," may arguably view these factors as suspicious. *Cortez*, 449 U.S. at 418.[9] In this case, however, the officers — particularly Sergeant Eldridge who led the pursuit — had little training in identifying a drug courier.

Sergeant Eldridge had been with the Memphis Police Department twenty-two years, yet, in October 1988, he had been with the airport drug task force only six months. Even

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[9]In *Sokolow*, the Supreme Court stressed that in determining whether a defendant's characteristics are consistent with the drug courier profile, the factors must be evaluated in terms of the officer's training:

> We do not agree with respondent that our analysis is somehow changed by the agents' belief that his [respondent's] behavior was consistent with one of the DEA's 'drug courier profiles.' (citations omitted). . . . A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow *detract* from their evidentiary significance as seen by a *trained agent.*

Id. at 1587 (emphasis added).

though Sergeant Eldridge stated that Taylor fit the drug courier profile, on cross-examination he *admitted* there is *no true* "*drug courier profile*," and that he had had *little* on-the-job experience with it.[10] Sergeant Eldridge contradicts himself — in one breath he contends that Taylor fit the drug courier profile, but in the next he denies that a drug courier profile exists.

It is well-known that police manuals instruct officers to become familiar with their beat and to identify people who do not "belong." *See, e.g.*, Johnson, *Race & the Decision to Detain a Suspect*, 93 Yale L.J. 214, 226 (1983). Sergeant Eldridge testified that Taylor appeared "different" from the other deplaning passengers:

> Q: All right. Now go ahead now, how did the defendant appear on this occasion?
>
> A: He appeared [in] kind of a grunnchy (sic) type work clothes. He had a dirty black baseball cap with something wrote (sic) across the front of it, and little squirrley, kind of like captains wear, the little gold squirrels across the bill . . . .
>
> Q: In the military — called scrambled eggs?
>
> A: There you go — scrambled eggs. And he had on, I think it was, a blue shirt with "Pace" or something written across the pocket. A pair of blue trousers, white tennis shoes.

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[10]On cross-examination, Sergeant Eldridge replied:

> Q: [H]ave you ever had any formal training in what constitutes a drug career (sic) profile . . . If so, tell me when and who taught you?
>
> A: Well, I — naw, I tell you, when you get into the word profile, I think we're starting to learn that there's no really (sic) criteria that you can actually say, yeah, hey, that is a druggy . . . .

Joint Appendix at 97. Transcript at 34.

> Q: And why do you say he — why did he stick out?
>
> A: *Well, the rest of the passengers that usually come from Miami flights is* (sic) *either business people or resort type people, people getting off in real casual nice looking clothes.* Like I say, it was just different seeing somebody getting off there looking like Mr. [Taylor] looked that night.

Joint Appendix at 87. Transcript at 11 (emphasis added). There is no dress code for passengers taking any flight. People are clad in a wide array of clothing whether or not they are coming from or going to a typical vacation spot. Using the flawed analysis employed by Sergeant Eldridge, *anyone* can not "belong" and fit the drug courier profile merely by their dress.

Officer Bevel testified that it was primarily Taylor's nervous behavior which caused her to believe that he had committed, or was in the process of committing, a crime. *See* Joint Appendix at 120. Transcript at 240. Furthermore, she testified that seventy-five percent of the individuals that the drug task force follows are black. *See* Joint Appendix at 117. Transcript at 211. Taylor was one of the first few people to deplane the flight. At the time he was stopped, Taylor was the *only* black person who had deplaned. In fact, Sergeant Eldridge and Officer Bevel believed Taylor may have been the only black person on the flight.

Many people, black and white, are constantly hurrying through an airport — they are looking around for the party meeting them or rushing to board a connecting flight. Walking fast or even running is not uncommon in an airport. Many people do not check-in their luggage to save time. All of these actions constitute perfectly lawful behavior. Yet, when the officers saw Taylor hurrying through the airport, looking around, and not stopping at the baggage area, they determined that he fit the drug courier profile. This determination was inappropriate, because observing an individual walking

quickly through an airport or nervously looking around is insufficient to warrant a search and seizure. Evidently, the agents were more apt to stop Taylor because of his race. *See Race & the Decision to Detain a Suspect*, 93 Yale L.J. at 234 ("Although the DEA has refused to commit the entire [drug courier] profile to writing, the profile clearly contains a racial component."). We cannot allow blacks and other minorities to become subject to unreasonable stops and governmental intrusions in airports because of their race.

Based on the officers' limited experience and the circumstances they observed, we conclude that they reasonably could not have suspected, as a matter of law, that Taylor was engaged in criminal activity. We find it particularly relevant that the *least* qualified officer, Sergeant Eldridge, led the pursuit. The evidence relied upon — Taylor's arriving on a plane from Miami, Florida, walking quickly through the terminal, clutching luggage — "describes a large category of presumably innocent travelers, who would be subject to virtually random seizures were [we] to conclude that as little foundation as there was in this case could justify a seizure." *Reid*, 448 U.S. at 441. Therefore, we believe the first prong of the *Cortez* test was not met.

The officers also failed to meet the second prong of the *Cortez* test because the factors that they relied upon evidenced unsuspicious behavior. We have held "certain behavior characteristics [are] inherently *unsuspicious* [of criminal activity] and thus, entitled to no weight in the calculation." *Saperstein*, 723 F.2d at 1228 (emphasis added). *See, e.g., United States v. Andrews*, 600 F.2d 563, 566 (6th Cir.), *cert. denied*, 444 U.S. 878 (1979) (nervousness deemed consistent with behavior among innocent airport travelers and is entitled to no weight); *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977) (circumstances where DEA agent observed three persons, two of whom were nervous, return on nonstop flight from Los Angeles to Detroit after short trip with only one suitcase did not provide specific and articulable

facts to warrant investigatory stop). Travel to and from an alleged source city also is inherently unsuspicious behavior. In *Andrews*, we explained:

> [T]ravel from Los Angeles cannot be regarded as in any way suspicious. Los Angeles may indeed be a major narcotics distribution center, but the probability that any given airplane passenger from that city is a drug courier is infinitesimally small. Such a flimsy factor should not be allowed to justify — or help justify — the stopping of travelers from the nation's third largest city. Moreover, our experience with DEA agent testimony in other cases makes us wonder whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center.

Andrews, 600 F.2d at 567.[11]

We find that Taylor's actions were inherently unsuspicious. The totality of the circumstances in the present case did not yield particularized suspicions that warranted a seizure based on a reasonable and articulable suspicion of criminal activity. Thus, we find Taylor's seizure unconstitutional and the evidence obtained as a result of that seizure must be suppressed.

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[11]The government maintains another significant, suspicious factor is that Taylor purchased his one-way ticket to Memphis in cash. Drug couriers benefit from the anonymity of cash transactions. *See Saperstein*, 723 F.2d at 1228. Here, however, Taylor purchased the ticket in his own name. Certainly, purchasing a ticket under one's legal name is uncharacteristic behavior for a drug courier. This casts further doubt not only on the officers' basis for stopping Taylor, but also on the reliability of the drug courier profile.

III.

Taylor contends that even if the initial seizure of his person was justified, he never gave verbal or written consent for the officers to search his bag. The government argues that Taylor explicitly consented to the search of his bag. The district court found as a matter of fact that Taylor consented to the search. We conclude, however, that such a finding was clearly erroneous.

It is well-settled that without a search warrant and in the absence of probable cause and exigent circumstances, the validity of a search depends on the defendant's purported consent. *See Florida v. Royer*, 460 U.S. 491, 497 (1983). Furthermore, where the validity of the search rests on consent, the government has the "burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." *Id. See Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979); *Schneckloth v. Bustamonte*, 412 U.S. 218, 233-34 (1973); *United States v. Williams*, 754 F.2d 672, 674-75 (6th Cir. 1985).

Whether Taylor's consent was voluntary or the product of coercion, express or implied, rests upon an analysis of the totality of the circumstances. *See Schneckloth*, 412 U.S. at 227. We have held that consent "must be proved by clear and positive testimony and must be unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion." *Williams*, 754 F.2d at 675. *See McCaleb*, 552 F.2d at 721.

There is sufficient evidence of coercion by the officers to negate any belief that Taylor voluntarily consented to the search of his bag. Sergeant Eldridge followed Taylor and grabbed him from the curb and back to the sidewalk. The officers surrounded Taylor so that he felt he could not leave without cooperating. These circumstances set the stage for the officers to elicit a positive response from Taylor to search

his bag. Furthermore, the transcript of the evidentiary hearing shows that there was a clear contradiction between Taylor's and the officers' account as to what occurred. The record below, therefore, was not clear and unequivocal. Taylor testified that although he did not consent, he unzipped the bag, looked through it and told the officers he had nothing of interest to them. Officer Bevel stated Taylor did consent to the search. Taylor testified that Officer Bevel jerked the bag from him and violently searched it causing some of the contents to fall on the sidewalk.

Moreover, the officers never informed Taylor that he had the right not to consent to the search of his bag.[12] Even though the Constitution does not require " 'proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search,' [*Schneckloth*, 412 U.S. at] 234 (footnote omitted), such knowledge [or lack thereof is] highly relevant to

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[12]At the evidentiary hearing, Sergeant Eldridge testified that it was not his responsibility to inform Taylor that he had the right not to consent:

> Q: Everything that you consented to — you gave him no chance to consent or not to consent, did you, because you didn't tell him that he had a right not to?
>
> A: Well, — you are right, I didn't tell him that he had a right not to.
>
> * * *
>
> Q: Okay. You did want him to know that he had the right to consent?
>
> A: That's up to him. Whether he had knew (sic) he had the right to consent or not, *it is not up to me to advise him that he has the right.* I can come up to any individual on the street and say I'm a police officer, but you don't have to talk to me but will you talk to me.
>
> Q: And you certainly didn't tell him he had a right to refuse you all to go in his bag?
>
> A: No, sir, I did not.

Joint Appendix at 108. Transcript at 96 (emphasis added).

the determination that there had been consent." *Mendenhall*, 446 U.S. at 558-59.[13] At no time during the stop did the officers inform Taylor that he did not have to cooperate and was free to withhold his consent. Considering the totality of the circumstances, we find that Taylor did not freely and voluntarily consent to the search of his bag.

Next, we must determine whether Taylor, when taken to the security office, consented to the continued search of the bag and the opening of one of the packages in which cocaine was found. Here again, we find that Taylor did not consent.

The fourth amendment limits the search and seizure powers "in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976). A search warrant issued by a neutral and detached magistrate protects individuals from capricious governmental interference. *See Johnson v. United States*, 333 U.S. 10, 13-14 (1948). Therefore, warrantless searches are *per se* unreasonable under the fourth amendment. They are upheld only in limited circumstances.[14]

From the testimony, it is evident that the officers asked

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[13]In *Mendenhall*, twice the officers expressly told the respondent that she was free to decline to consent to the search. The Court found that these explanations by the officers substantially lessened the probability that their conduct reasonably could have appeared coercive. *See Mendenhall*, 446 U.S. at 558-59.

[14]The exceptions to the warrant requirement include: automobile searches, *United States v. Ross*, 456 U.S. 798 (1982); consent searches, *Bumper v. North Carolina*, 391 U.S. 543 (1968); searches incident to a lawful arrest, *United States v. Robinson*, 414 U.S. 218 (1973); limited searches and seizures under the stop and frisk doctrine, *Terry v. Ohio*, 392 U.S. 1 (1968); searches and seizures in hot pursuit of a fleeing felon, *United States v. Santana*, 427 U.S. 38 (1976); and searches and seizures to prevent the loss or destruction of evidence, *Vale v. Louisiana*, 399 U.S. 30 (1970).

Taylor to sign both a written statement and a consent to search form. Taylor refused both requests. Absent consent, exigent circumstances or one of the exceptions, a search warrant was needed for the officers to lawfully search Taylor's bag. *See Katz v. United States*, 389 U.S. 347, 356-59 (1967); 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2d § 666 (1982). The officers had sufficient time and ample opportunity to secure a search warrant; nevertheless a search warrant was never obtained. Because the bag was searched and the package opened without a search warrant, the search was impermissible. *See Katz*, 389 U.S. at 357. Since we hold that Taylor's consent, if any, was not voluntary, the search was not permissible. Therefore, the cocaine recovered from Taylor's bag must be suppressed as the product of an illegal search and seizure.

IV.

The mere fact that a black man is observed walking quickly through an airport terminal does not raise the suspicion of criminal activity. Any attempt to detain such an individual, therefore, *must* be conducted within the parameters of the fourth amendment. In this instance, the fourth amendment's protections were ignored. The officers failed to establish that a reasonable, articulable suspicion existed to warrant Taylor's detention. Moreover, the facts do not indicate that Taylor consented to the search. Therefore, we order the suppression of evidence seized pursuant to this unconstitutional arrest, search and seizure. Although we recognize the importance of curtailing illicit drug use in our society, the "War on Drugs" can never license law enforcement officials to disregard the rights guaranteed by the fourth amendment of our Constitution.

For the foregoing reasons, we **REVERSE** the judgment of the district court and **REMAND** the case for further consideration consistent with this opinion.

MERRITT, Chief Judge, concurring. I concur in the Court's conclusions about this case. I particularly agree that law enforcement agents cannot make a racial characteristic the predominant feature in the drug courier profile. Like the Court I can find no real basis for distinguishing this man from the other passengers who deplaned, except for race.

But I would reach the result even if race did not seem to be the overriding reason for the officer's intervention. Prior to obtaining any evidence whatever that could establish "probable cause," Officer Eldridge arrested Taylor. Eldridge candidly admitted as much when he testified: *Taylor was not in fact free to leave.* All of the signs and circumstances of the sidewalk confrontation point in the same direction. Thus prior to finding any evidence of a crime, Taylor was "seized" within the meaning of the Fourth Amendment. It was not a brief *Terry* stop to make inquiry. It was an illegal arrest.

The seizure of the contraband was a direct consequence of the illegal arrest. One need not necessarily debate the question of whether the opening of the bag was consensual at the moment Taylor unzipped it. In the larger sense it was coerced because it was the fruit of an unlawful arrest, and so the search was also unlawful.

Under our current law, there is no escape from the conclusion that the contraband must be suppressed. Constitutional rules protecting individual privacy and freedom from unreasonable governmental restraint apply to police officers as well as courts, and the officer's unnecessarily precipitous and coercive action in violation of these rules, unfortunately, has defeated his case.

NO. 89-6396

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed: Feb. 15, 1991

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs. ORDER

EDDIE LOUIS TAYLOR

Defendant-Appellant.

BEFORE: MERRITT, Chief Judge; KEITH, KENNEDY, MARTIN, JONES, KRUPANSKY, MILBURN, GUY, NELSON, RYAN, BOGGS, NORRIS and SUHRHEINRICK, Circuit Judges.

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 14 provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the

case on the docket as a pending appeal.

Accordingly, it is ORDERED that the previous decision and judgment of this court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as practicable.

ENTERED BY ORDER OF THE COURT

/s Leonard Green

Leonard Green, Clerk

Supreme Court, U.S.
FILED
JUL 10 1992
OFFICE OF THE CLERK

No. 91-1797

In the Supreme Court of the United States

OCTOBER TERM, 1992

EDDIE LOUIS TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly declined to address the issue, raised for the first time on appeal, of whether the police unconstitutionally decided to question petitioner based on his race.

2. Whether petitioner was seized when several police officers questioned him as he was leaving an airport.

3. Whether petitioner voluntarily consented to a search of his carry-on tote bag.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1-43) is reported at 956 F.2d 572. The opinion of the panel of the court of appeals (Pet. App. 62-82) is reported at 917 F.2d 1402. The opinion of the district court (Pet. App. 44-61) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1992. The petition for a writ of certiorari was filed on May 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional plea of guilty in the United States District Court for the Western District of Tennessee, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 63 months' imprisonment, to be followed by three years' supervised release, and he was fined $3,000. The court of appeals, sitting en banc, affirmed. Pet. App. 1-43.

1. Petitioner was arrested at the Memphis International Airport in Memphis, Tennessee, after two kilograms of cocaine were found inside his luggage. The government's evidence at the suppression hearing showed that petitioner arrived in the Memphis airport aboard a flight from Miami, Florida, at approximately 7 p.m. on October 3, 1988. Three plainclothes Memphis police officers who were part of a drug task force stationed at the Memphis airport observed petitioner as he arrived in the gate area. Petitioner was the only black person in the initial group of arriving passengers. While the other passengers in the initial group were wearing business suits or vacation attire, petitioner was wearing dirty work clothes and a baseball cap, and he was clutching a designer carry-on tote bag that seemed new. Petitioner also appeared nervous and continually looked around. Without consulting each other, the three officers followed petitioner into the terminal. Pet. App. 2; Gov't Supp. C.A. Br. 2.

As he left the gate area, petitioner walked rapidly down the concourse, periodically looking over his shoulder as if to check whether he was being followed. One of the officers, Joseph Eldridge had to break into a light jog to keep up with petitioner; the other two officers followed. Petitioner did not stop at the luggage carousel in

the baggage claim area. Instead, he went directly to the terminal exit. Pet. App. 2; Gov't Supp. C.A. Br. 2.

After leaving the terminal, petitioner headed toward a parking lot across the street from the terminal. At the edge of the sidewalk, he stopped. Officer Eldridge approached petitioner. Without touching or grabbing petitioner, Officer Eldridge identified himself as a police officer, displayed his credentials, and asked to speak with petitioner. A second officer, Bonnie Bevel, also approached petitioner and identified herself. Petitioner agreed to speak with the two officers. The third officer did not approach petitioner, but stood across the street approximately 35 feet away. Pet. App. 2-3; Gov't Supp. C.A. Br. 2-3.

Petitioner told the officers that he lived across the river in Haiti, Missouri. Officer Eldridge asked petitioner for his airline ticket, and petitioner gave it to him. The ticket was a one-way ticket from Miami to Memphis in the name of "E. Taylor" that had been purchased with cash. While Eldridge examined the ticket, Officer Bevel asked petitioner how long he had been in Miami. When petitioner replied three weeks, Bevel asked why he had only one small tote bag for a three-week stay in Miami. Petitioner did not respond, and he appeared increasingly nervous. He was sweating profusely, his hands were trembling, and he kept shifting from foot to foot. Eldridge handed the ticket back, and asked petitioner for some form of identification. Petitioner produced a Missouri driver's license in the name of "Eddie L. Taylor." After examining the license, Eldridge gave it back to petitioner. Pet. App. 3; Gov't Supp. C.A. Br. 3.

After the officers returned petitioner's airline ticket and driver's license, Officer Bevel asked if she could look into petitioner's carry-on tote bag. Responding affirmatively, petitioner put the bag on the sidewalk and unzipped it to expose some wadded up paper inside.

Petitioner shuffled the paper around in the bag and told the officers that the bag contained only some gifts for his children. The officers asked if they could look into the bag, and petitioner said "okay." When Officer Bevel spread the paper apart, she saw two tightly wrapped spheres that resembled packages of cocaine. At that point, the officers asked petitioner to accompany them to their airport office for further investigation. Pet. App. 3-4; Gov't Supp. C.A. Br. 3-4.

At the airport office, petitioner was advised of his *Miranda* rights, and the officers removed the packages from the tote bag. The officers asked petitioner if they could open the packages, and petitioner consented. Officer Bevel made a small cut in one package and performed a field test on its white, powdery contents, which tested positive for cocaine. Petitioner was then arrested. During the ensuing search, the officers found $1,000 hidden in petitioner's socks as well as additional money in his pockets and wallet. Pet. App. 4; Gov't Supp. C.A. Br. 4-5.

2. Before pleading guilty, petitioner moved to suppress the cocaine found in his tote bag. In support of his motion, petitioner testified that he had walked out of the airport at his usual pace, that he had not been nervous, and that he had not looked around. According to petitioner, Officer Eldridge grabbed him by the elbow outside the terminal and pulled him back from the curb, with Officer Bevel joining Eldridge three or four minutes later. Petitioner testified that the officers crowded him and forced him to step back to within two or three feet of the terminal building. He stated that while no officer displayed a weapon, he had seen a gun in the waistband of Eldridge's trousers. Petitioner claimed that Eldridge did not return his airplane ticket or his driver's license after he inspected them. Pet. App. 2-3; Gov't Supp. C.A. Br. 5-6.

Petitioner further testified that when the officers asked for his permission to look in the tote bag, he told the officers that it contained nothing of interest to the officers. According to petitioner, he placed the bag on the ground, unzipped it, moved some papers around, and again told the officers that its contents were not of interest to them. Petitioner claimed that when he closed the bag and started to put it on his shoulder, Officer Bevel removed his hand from the strap and snatched the bag. Petitioner claimed that he did not know cocaine was in his tote bag and that he thought the bag contained gifts for his children. Pet. App. 3-4; Gov't Supp. C.A. Br. 5-6.

The district court credited the officers' testimony over petitioner's and denied his motion to suppress the cocaine. Pet. App. 44-61. After summarizing the testimony of the three officers and petitioner, the court found that "[petitioner] consented to [the] interview by the officers" and "consented to the search of his tote bag." *Id.* at 60-61. The court stated that "[petitioner] was actually arrested when the cocaine was discovered in the tote bag. At that point, he was not free to leave the presence of the officers." *Id.* at 61. The court concluded that petitioner had been the subject of "a legal arrest." *Ibid.*

3. A panel of the court of appeals reversed. Pet. App. 62-82. Based on petitioner's testimony at the suppression hearing, the court found that petitioner was seized when he was approached by the officers outside the airport. *Id.* at 67-71. The court then concluded that the seizure violated the Fourth Amendment because the officers did not have a reasonable suspicion that petitioner was engaged in criminal activity and therefore could not lawfully conduct an investigatory stop. *Id.* at 71-77. The court stated that "[petitioner] did not meet the drug courier profile," and that "the agents were

more apt to stop [petitioner] because of his race." *Id.* at 73, 76. Based on petitioner's testimony, the court also ruled that the district court had clearly erred in finding that petitioner had consented to the searches of his carry-on tote bag outside the airport and inside the office. *Id.* at 78-81.

4. On rehearing en banc, the court of appeals affirmed by an 8-4 vote. Pet. App. 1-43. The court first held that petitioner was not seized within the meaning of the Fourth Amendment when he was approached by the police officers outside the airport. *Id.* at 5-9. The court explained that "[t]he district court expressly determined that the initial contact between [petitioner] and the law enforcement officers consisted of no more than a consensual 'interview.'" *Id.* at 6. It noted that "the trial court's finding of fact was predicated upon the credibility that the judge assigned to the witnesses." *Id.* at 6-7. "Where there are two permissible views of the evidence," the court added, "the factfinder's choice between them *cannot be clearly erroneous*." *Id.* at 7 (emphasis by court of appeals). The court concluded that "[t]he district court's factual conclusion in the instant case that the initial encounter was not a 'seizure' was factually supported by the record developed below, and was, as a matter of law, fully consistent with the published opinions of the Supreme Court and this court mandating that a 'seizure' does not occur when officers approach an individual and, after identifying themselves, request an interview and an opportunity to inspect the individual's driver's license and airline ticket." *Id.* at 8.

The court of appeals also held that the district court did not err in finding that petitioner had consented to the search of his tote bag. Pet. App. 9-10. The court explained that "[i]n determining that [petitioner] voluntarily consented to the search of his bag, the district judge again relied upon his personal observations of the

witnesses and assigned greater credibility to the testimony of the officers than he assigned to that of [petitioner], thus reaching a factual conclusion that was not clearly erroneous." *Id.* at 10. The court also ruled that petitioner's arrest following the officers' discovery of the two spherical packages in his bag was supported by probable cause. *Id.* at 10-11.

Because the court of appeals upheld the district court's determinations that both the initial encounter between petitioner and the officers and the search of petitioner's tote bag were consensual, the court of appeals found it "unnecessary to consider or decide * * * whether the officers' surveillance of [petitioner] was motivated to any degree by his race, or the broader constitutional issue whether the alleged incorporation of a racial component into the DEA's drug courier profile would, if true, violate an individual's rights to due process and equal protection of the laws." Pet. App. 11-12. The court noted that "[a] review of the suppression hearing transcript, the briefs and arguments of counsel before the trial court and initially before this court, disclosed no charge that [petitioner] had been selected for a consensual interview because he was an African-American, that the law enforcement officers at the Memphis Airport implemented a general practice or pattern that primarily targeted minorities for consensual interviews, or that they had incorporated a racial component into the drug courier profile." *Id.* at 12.[1]

Judge Guy concurred separately. Pet. App. 13-15. In his view, "the significant aspect of our en banc holding" is that "we now essentially conclude that the panel erred

[1] The court stated that "[a] factually supported record of such charged official conduct in the instant case would have given rise to due process and equal protection constitutional implications cognizable by this court." Pet. App. 12.

in substituting its judgment for that of the trial court on the factual issue of consent as well as substituting its credibility determinations for those of the district judge." *Id.* at 13. Noting that the majority opinion also "could be read as concluding that, where first encounters are consensual, racial considerations are irrelevant," *id.* at 14, Judge Guy indicated that, in his view, "a procedure that would target primarily minorities for consensual interviews" would be suspect. *Ibid.* Nevertheless, he believed that in reaching that issue, the original panel had acted "in a manner inconsistent with the normal scope of appellate review and on the basis of a record never properly developed in the district court." *Id.* at 14-15.

Chief Judge Merritt and Judges Keith, Martin, and Jones dissented. Pet. App. 16-43. In their view, petitioner had been unconstitutionally stopped "solely because he was an African-American male." *Id.* at 20. The dissenting judges also agreed with the panel's disposition of the Fourth Amendment issues in the case. *Id.* at 23-36.

ARGUMENT

1. Petitioner contends (Pet. 31-40) that the record in this case shows that he was the subject of a discriminatory law enforcement policy and that the court of appeals incorrectly declined to address that issue because of its view that petitioner had consented to be interviewed and to allow his carry-on tote bag to be searched. Those contentions do not warrant this Court's review.

The court of appeals recognized that "[a] factually supported record" of discrimination in law enforcement practices at the Memphis airport "would have given rise to due process and equal protection constitutional implications cognizable by this court." Pet. App. 12. In light of the record in this case, however, the court of appeals

correctly declined to reach those constitutional claims. As the court noted, petitioner never claimed before the district court or the original panel that the police officers had targeted him for an interview because he was black. *Ibid.*; see *id.* at 14 n.1 (Guy, J., concurring). Petitioner did not make such a claim even in his supplemental brief that was filed after the full court granted rehearing of the original panel's decision. As Judge Guy observed, petitioner's race became an issue only when "the panel concluded, contrary to the district court, that there was a seizure and then proceeded to work backwards and conclude there was no justifiable basis [to establish reasonable suspicion] for the seizure." *Id.* at 13.[2] Given the inadequately developed record in this case on the alleged role of racial considerations in the police actions leading to petitioner's arrest, this case affords no occasion for the Court to review the equal protection issues raised by petitioner.[3]

Contrary to the contention of petitioner (Pet. 32-34) and the dissenting judges (Pet. App. 18-20), the record does not establish that the police officers in this case targeted petitioner for an interview because he is black

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[2] Judge Guy further observed that "[t]here was some effort made after the case was scheduled for an en banc hearing to expand the record and provide a basis for reaching beyond what was before the district court. Although we can expand the scope of legal issues before us, I believe it is improper to attempt to build a record different than that before the district court." Pet. App. 15 n.3.

[3] Judge Guy stated in his concurrence that it is possible to read the majority's opinion as finding that, in light of petitioner's consent to be interviewed and searched, any racial considerations that led the officers to focus on him initially became "irrelevant." Pet. App. 14. The majority, however, explicitly stated that petitioner did not raise a racial issue in the district court or his initial appellate briefs—and that a properly supported record would raise constitutional concerns "cognizable by this court." *Id.* at 12.

or that Memphis police officers discriminate against blacks generally in their enforcement of the drug laws at Memphis International Airport. While Officer Bevel estimated that 65% to 75% of the individuals followed by the drug task force in the past had been blacks, she also explained that the fact that a person is black does not make him more likely to be the subject of police suspicion. Rather, she testified that more blacks are followed "[o]nly because we see certain indicators [of criminal activity] there." C.A. Joint App. 117 (reproducing Tr. 211). Even assuming that a disproportionate number of blacks are stopped, that fact would not raise equal protection concerns unless blacks are stopped *because* of their race. Cf. *Wayte* v. *United States*, 470 U.S. 598, 610 (1985); *Hernandez* v. *New York*, 111 S. Ct. 1859, 1873-1874 (1991) (O'Connor, J., concurring). The record does not support the latter claim.

2. Petitioner renews his contention (Pet. 40-61) that he was seized in violation of the Fourth Amendment when the police officers approached him outside the airport. Based on the findings of the trial court, the court of appeals correctly rejected that contention.[4]

A Fourth Amendment "seizure does not occur simply because a police officer approaches an individual and asks

[4] Petitioner asserts (Pet. 41 n.2, 48-52) that the court of appeals incorrectly applied the "clearly erroneous"—rather than de novo—standard of review to the issue whether he was seized. The court of appeals stated, however, that "[t]he district court's factual conclusion * * * that the initial encounter was not a 'seizure' was factually supported by the record developed below, and was, as a matter of law, fully consistent with the published opinions of the Supreme Court and this court." Pet. App. 8. Thus, the court of appeals did not defer to the district court's conclusion on the ultimate issue of whether petitioner was "seized," but endorsed that conclusion because it was consistent with the legal determinations reached by appellate courts on comparable factual records. *Id.* at 8-9.

a few questions. So long as a reasonable person would feel free 'to disregard the police and go about his business,' * * * the encounter is consensual and no reasonable suspicion is required." *Florida* v. *Bostick*, 111 S. Ct. 2382, 2386 (1991), quoting *California* v. *Hodari D.*, 111 S. Ct. 1547, 1552 (1991); see also *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988); *INS* v. *Delgado*, 466 U.S. 210, 216 (1984). In this case, petitioner's contention that he was seized outside the airport is based entirely on his own testimony at the suppression hearing. As the court of appeals explained, however, the district court's conclusion that the initial contact between petitioner and the police officers was a consensual encounter rested on the determination that the police officers' testimony was more credible than petitioner's testimony. The court of appeals' decision to uphold that determination does not warrant this Court's review.

Petitioner also argues (Pet. 45-47) that Officer Eldridge's testimony that he would have pursued petitioner had he fled demonstrates that a seizure occurred outside the airport. The subjective intent of Officer Eldridge, however, is relevant to the seizure issue only to the extent that Eldridge's intent was conveyed to petitioner. See *Berkemer* v. *McCarty*, 468 U.S. 420, 442 (1984); *United States* v. *Mendenhall*, 446 U.S. 544, 554 n.6 (1980) (opinion of Stewart, J.). As the court of appeals noted, "[t]he record in the case at bar fails to disclose either directly or by implication that Eldridge conveyed his subjective intentions to [petitioner]." Pet. App. 7 n.2.

3. Finally, petitioner asserts (Pet. 61-71) that the search of his carry-on tote bag violated the Fourth Amendment because he did not consent to the search. That claim, however, seeks to relitigate the finding of the district court, upheld by the court of appeals, that petitioner voluntarily consented to the search of his bag.

The issue of whether consent to search was voluntarily given is one of fact "to be determined from the totality of all the circumstances." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973). As with his claim that he was seized from the moment his encounter with the police began, petitioner's contention (Pet. 65-71) that he did not consent to a search of his carry-on tote bag is based on his own testimony about what occurred. As the court of appeals explained, however, "[i]n determining that [petitioner] voluntarily consented to the search of his bag, the district judge again relied upon his personal observations of the witnesses and assigned greater credibility to the testimony of the officers than he assigned to that of [petitioner], thus reaching a factual conclusion that was not clearly erroneous." Pet. App. 10. The court of appeals correctly stated that an appellate court is not well situated to second-guess the district court's finding. As Judge Guy noted, "the significant aspect of our en banc holding" is to reaffirm that "the panel erred in substituting its judgment for that of the trial court on the factual issue of consent as well as substituting its credibility determinations for those of the district judge." *Id.* at 13. Petitioner's insistence that such appellate oversight was warranted raises no issue meriting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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